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Supreme Court, U.S.
FILED

02 788 SEP 12 2002

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No. _____

# In the
# Supreme Court of the United States

CAROL Y. ROBINSON

*Petitioner,*

*v.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO
BLONDEAN Y. DAVIS
JOHN H. BRADLEY, JR.

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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96 pp

## QUESTIONS PRESENTED

1. Whether the Appellate Court in determining if the District Court had abused her discretion in dismissing Petitioner's action for failure to proceed/prosecute erred in not considering Petitioner's argument on appeal that it was an error of law as well as an abuse of discretion by the judge when the she dismissed two of the defendants from Petitioner's lawsuit without making an express determination that there was no reason for just delay nor an express direction for the entry of judgement, in violation of FRCP 54(b) [Judgment Upon Multiple Claims or Involving Multiple Parties] less than a week before trial, based on a motion in limine, which had not been served upon Petitioner, nor scheduled for a hearing, on a day Defendants had been notified that Petitioner would not be in court, leaving Petitioner in the position of losing her § 1983 claim against the dismissed defendants and Petitioner had doubts that if she proceeded to trial that on appeal contesting their dismissal, she might be precluded from bringing the dismissed parties back in to the lawsuit based on the expiration of the statute of limitations for actions under 42 U.S.C. § 1983.

2. Whether the Appellate Court erred in not determining the issue of whether the Memorandum Opinion and Order of the judge who presided over Petitioner's action prior to it being transferred to the challenged judge, dismissed Petitioner's § 1983 claim and Title VII claim for retaliation pursuant to Title VII and if so, was it reversable error

3. Whether the Appellate Court should have considered that Petitioner had filed a "Notice To The Court" with the District Court Judge indicating that Petitioner *did* intend to prosecute her case pending the resolution of Petitioner's recusal motion *and* the filing of a "Complaint of Judicial Misconduct" against the Judge.

4. Whether the Appellate Court should have determined the issue of whether Petitioner's Second Amended Complaint stated a cause of action pursuant to U.S.C. § 1983 for violation of her rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and a claim for retaliation pursuant to Title VII of the Civil Rights Act of 1964.

5. Whether a writ of mandamus is the only method of challenging a court's refusal to recuse itself when challenged under 28 U.S.C. 455 (a).

6. Whether, if section U.S.C.455 (a) and (b)(1) are to be considered in pari materia with U.S.C.144, a court is to take no further action in that case, including advancing the date of the scheduled hearing of the motion for recusal for the purpose of denying it and dismissing Petitioner's claim during the same hearing thereby mooting any petition for a writ of mandamus Petitioner would have filed where it is known that in this court's circuit it is the only way to challenge a judge for refusing to recuse herself.

**7.** Whether the Appellate Court erred in not considering the totality of the circumstances which led to the dismissal of Petitioner's action especially Petitioners vigorous prosecution of her case prior to her motion to recuse the judge.

**8.** Whether the Appellate Court erred in not examining the judge's rulings for indications of bias.

**9.** Whether Petitioner's right to due process were violated when the judge ruled on a motion in limine tendered by the defendants which had not been served upon the Petitioner and Petitioner had no knowledge such motion would be considered and the motion acted upon resulted in a dismissal of two of the defendants in the lawsuit against whom the Petitioner had a claim under 42 U.S.C. § 1983.

**10.** Whether it was improper for the Appellate Court to attribute to the Petitioner a contention she did not make– "no district judge appointed by President Clinton can be impartial in a sexual harassment case.", in order to justify its position that "there is no possible problem here of either actual or apparent bias.

## PARTIES TO THE PROCEEDING

### Petitioner

Petitioner is Carol Y. Robinson, an individual citizen of the United States, residing in the Northern District of Illinois. Petitioner has no corporate affiliations. Carol Y. Robinson was the Plaintiff in the District Court, and the Appellant in the Seventh Circuit Court of Appeals.

### Respondents

The Board of Education of the City of Chicago - Pursuant to amendments to the Illinois School Code, the Illinois Legislature established the Chicago School Reform Board of Trustees, in an amendatory act which took effect in 1995, to take the place of the former Board of Education thereby turning over the control of the Chicago Public Schools to Mayor Richard M. Daley of Chicago. See, 105 ILCS 5/34-1, et seq. Each city having a population exceeding 500,000 shall constitute one school district which shall maintain a system of free schools under the charge of a board of education. The district shall be a body politic and corporate by the name of "Board of Education of the City of ....." and by that name may sue and be sued in all courts and places where judicial proceedings are had. 105 ILSC 5/34-2.

Blondean Y. Davis is an individual, formerly employed by the Board as Chief of Schools and Regions.

Davis resigned from the Board effective July 31, 2001. She is currently Superintendent of Matteson Elementary School District 162.

John H. Bradley, Jr. in an individual. Bradley is/was a principal at the Songhai Learning Center Petitioner is unaware of Bradley's current employment status with the Board.

Respondents Board, Davis, and Bradley were the Defendants in the District Court and the Appellees in the Seventh Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Seventh Circuit Court of Appeals in this case.

## OPINIONS BELOW

The Seventh Circuit opinion (App. B at 2a) is an unpublished opinion. The District Court Memorandom Opinion and Order (App. E at 7a) is reported at 1999 WL 675302 (N.D. Ill.)

## STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on June 14, 2002.(App. A at 1a)

The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1254(1)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A.. 42 U.S.C. § 2000e, et. seq., Title VII of the Civil Rights Act of 1964 as amended, prohibits discrimination in employment and retaliation for opposing such practices.

The pertinent sections provide:

"Under Title VII of the Civil Rights Act of 1964, it shall be an unlawful employment practice for an employer...to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to

his compensation, privileges of employment, because of such individual's race, color, religion, sex, or natural origin." 42 U.S.C. § 2000 -2(a)(1).

Title VII makes it an "unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful practice by this subchapter..." 42 U.S.C. § 2000e-3(a).

B. 42 U.S.C. § 1983 provides for remedies for the deprivation of rights under color of law.

42 U.S.C. § 1983 is not itself a source of substantive rights. It is invoked to provide remedies to vindicate federal rights conferred from other sources. *Graham v. Connor* (1989, U.S.) 104 L.Ed 2d 443. One cannot go into court and claim a "violation of § 1983" for the section, by itself, does not protect anyone against anything. *Chapman v. Houston Welfare Rights Organization* (1979) 441 U.S. 600.

The statutes primary purpose, as the Supreme Court said in *Owen v. City of Independence*, 445 U.S. 622 (1980) is "the preservation of human liberty and human rights..." *Id.* at 636.

In *Gomez v. Toledo*, 446 U.S. 635, the Court note the requirements under section 1983.

By the plain terms of § 1983, two--and only two--allegations are required in order to state a cause of action under that statute. First, the plaintiff must

allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him that right acted under color of state or territorial law.

*Id* at 640

C. 28 U.S.C. § 455 (a) and (b)(1) Disqualification of justice, judge, or magistrate.

In relevant part it states:

(a) Any justice, judge, or magistrate [magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has personal bias or prejudice concerning a party, or personal knowledgeof disputed evidentiary facts concerning the proceeding;

The task of fashioning a remedy for a violation of § 455 (a) has been delegated by Congress to the judiciany. L*iljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. at 862. As the Supreme Court Stated in *Liljeberg*, "[w]e must continuously bear in mind that 'to perform its high function in the best way' "justice must satisfy the appearance of justice." *Liljeberg*, 486 U.S. at 864 (quoting *In re Murchinson*, 349 U.S. 133, 136.

The purpose of U.S.C. 455(a) is to provide for a fair and impartial tribunal for litigants.

## STATEMENT OF THE CASE

Carol Y. Robinson brought this action against her employer, the Board of Education of the City of Chicago ("Board"), Blondean Y. Davis ("Davis") at that time subdistrict superintendent and supervisor to Robinson's principal, and John H.Bradley, Jr., Robinson's supervisor, for harassment based on her sex and retaliation under Title VII, and various state torts. Robinson's complaint also states a claim under 42 U.S.C. § 1983 for violations of her rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Robinson's case was originally assigned to the Honorable John A. Nordberg. Judge Nordberg conducted some court proceedings and assigned the case to Magistrate Judge Martin C. Ashman for supervision of discovery and other matters. Upon the completion of discovery, Defendants moved for summary judgment and were granted partial summary judgment. *See* (App. E at page 7a). The Court granted Defendants' motion for summary judgment on all Robinson's state claims but denied summary judgment on petitioner's quid pro quo sexual harassment claim. The Order did not dimiss a § 1983 claim, nor did it dismiss Robinson's claim for retaliation under title VII.

On September 5, 2000, for reasons unknown to the petitioner, the case was reassigned to the docket of Judge Joan Humphrey Lefkow by Executive Committee Order.

The parties appeared before Judge Lefkow for the first time on May 25, 2001 for a hearing which was reset to

June 19, 2001, and it was reset a third time to June 26, 2001. This hearing was reset by agreement of the parties due to the need for Defendants' attorney, Sunil Kumar, to have surgery on his leg.

At the June 26 status conference the pretrial conference was set for July 25, 2001. It was at this conference that problems began. Petitioner has described some of the events of that conference in (App.G *"Motion to Recuse & Affidavit"* beginning at page 31a). The Motion and Affidavit appear in their entirety in the index of this petition.

Plaintiff arrived early on the day of the pretrial confernce and sat in the courtroom. Attorneys for Defendants arrived shortly thereafter. The parties were directed to relocate to another room, but not the judge's chambers. Plaintiff had anticipated that the proceeding would take place in the courtroom in the presence of a court reporter in order that a record of the proceeding might be made for future use in the event of a dispute between the parties. Petitioner often had transcripts of proceeding when there was a dispute between the her and various counsels for Defendants.

During the July 25, 2001 pretrial conference, discussion was had concerning issues in the lawsuit. At one point during the discussion, Judge Lefkow motioned for the attorneys for Defendants to leave the room. When Judge Lefkow and petitioner were alone, Judge Lefkow inquired of the petitioner in an unpleasantly terse tone, "Do you think it's fair to *me* for you to go ahead with your lawsuit?" The judge then described her unsolicited views about sexual harassment lawsuits. Her tone was in stark contrast to that which uses on the record in open court.

She stated that these cases were nothing but "he said, she said". The judge went on to share with petitioner, "I had a case like this before. It [the plaintiff] was a man. He went ahead to trial. *He lost.*" Though subtle, it was discernable that the Judge was attempting to itimidate the petitioner. Judge Lefkow made clear her feelings about cases of sex discrimination. She indicated that, for her, they were a waste of time and inferred that anyone going foward with such a case evidenced what she perceived to be a disrespect for her court's time.

Judge Lefkow also questioned Petitioner as to whether she thought it was fair to potential jurors for Petitioner to proceed to trial. She state disdainfully that Robinson's exercising her right to a jury trial would deprive potential jurors of a chance to "earn a day's pay" at their place of employment, "just so you can have your day in court."

Robinson was quite shocked by the content and tone of Judge Lefkow's remarks. She told Judge Lefkow that she was sorry that the judge felt this way but that her decision to go to trial had nothing at all to do with an inconsideration for the court's time. Rather, Petitioner's reason for going to trial was to seek redress from the court for Defendants' unlawful behavior.

In her recusal motion Petitioner acknowledged, "...we do live in a litigious society. Plaintiff, however, has never been a party to a lawsuit. The court's docket may be bursting at the seams and that is unfortunate. A Plaintiff, however, should never be made to feel that his pursuit of justice is a burden upon the court inasmuchas his taxes help to support it. If there is need to place blame, it should be placed squarely upon the shoulders of those to whom it

belong--defendants guilty of unlawful conduct, for without such unlawful behavior, actions such as this one could not be brought. It is not through any fault on the part of the Plaintiff that her case was reassigned to this Court."

Judge Lefkow noted that the parties had previously participated in a settlement discussion before another judge and asked how much money defendants had offered her. When petitioner responded "about $20,000.00", Judge Lefkow asked in a condescending tone of voice, "Have you ever had that much money?" You could put a down payment on a house."

Petitioner noted in her recusal motion, "While it is perhaps the duty of the judge to "encourage" settlement of disputes in an interest to reduce the court's docket, it should never give the impression that it is a plaintiff's only option for resolution.

Robinson further noted in her recusal motion the difference in treatment accorded counsels for defendants and petitioner during the pretrial conference. Petitioner related that she was cut off time and again while defendants' counsels were listened to with courtesy with their arguments being heard in its entirety prompting Petitioner to request permission to present written responses to Defendants' motions in limine since her oral responses were not being listened to. At one point when Petitioner objected to one of the judge's ruling she said, in the presence of counsels for defendants, "That's why we have the Appellate Courts.", practically daring Petitioner to challenge her rulings.

During the pretrial conference there was a mix up regarding how many motions in limine had been served

upon Petitioner. Originally, Petitioner believed she had received the motions which were identified on Defendants' cover page. A closer examination, however, revealed that the number of motions that had been served on petitioner did not match up with the number of motions counsel for Defendants had given to Petitioner. Counsel for Defendant, Sunil Kumar gave Petitioner a copy of a motion in limine that had not been served on her and sent another copy of the same motion to Petitioner's work site even though she was still on summer vacation. He still, however, did not serve her with the motion in limine which eventually led to his clients being dismissed from Petitioner's action.

During the pretrial conference, when it became apparent that the this procedure was going to be time consuming (Defendants' had objected to about 20 of Petitioners' witnesses, and dozens of her trial exhibits) Judge Lefkow ask defendants' counsel, Sunil Kumar, if she granted his motions in limine whether it would lessen the number of exhibits she would have to rule on, and he stated that it would. The judge then stopped hearing argument on this topic and rescheduled it for October 18, 2001.

In her recusal motion, Petitioner stated, "Plaintiff found this action to be unsettling in that she felt any argument she offered in response in response to Defendants' motions in limine would be an act of futility in that the judge had already indicated how she would rule. Her implication was that she would be ruling, not based on the merit of the arguments..." (App. page 35a)

At the conclusion of the pretrial conference the court continued hearing on the motions to October 18, 2001. There were a total of five motions scheduled to be

heard: Defendants' first, third, fourth, fifth, and sixth motions in limine. The motion in limine in dispute, Defendants' *second* motion in limine was not scheduled since it had yet to be served upon Petitioner.
This much is clear from the court's docket entries. They show that the motion was filed with the court on November 7, 2001.

Petitioner, during the preparation of this petition, obtained a certified copy of the motion and it also contained the earlier date, the same as all the other motions. Petitioner distinctly recalls accompanying the defendants' agent to the Courthouse to file the pretrial order in this case and motions in limine. The intake clerk remarked, "This must be a big case." Perhaps it was because the Defendants had a large suitcase with many copies of the documents in tan envelopes.The defendants' agent showed several of the documents to the clerk after which the clerk handed over the court's date stamp and defendants' agent started to stamp the documents. Defendants' agent gave petitioner a copy of the pretrial brief and told her she would receive a copy of the motions in limine at a later date. Robinson took her copy of the pretrial order and stamped the pages then she left while defendants' agent continued to stamp the documents.

Robinson also reminded the judge, in her affidavit in support of her recusal motion, that she had allowed an attorney, Sherri Thornton, who was *not* an attorney of record in this case, to participate in the pretrial conference. (*See* App. page 39a) para. 4. About two weeks later, on August 8, 2001, Judge Lefkow granted Defendant's motion to substitute the appearance of Sherri Thornton for Taryn Springs. Both had participated in the pretrial conference.

Petitioner felt that other acts committed by the judge during the pretrial conference were unethical and in a later "Motion to Correct the Official Record" Petitioner alluded to the unethical acts. (Doc.#164 November 6, 2001). Petitioner's primary objection was that the judge refused to put the rulings on the record. Although Petitioner had requested the a court reporter, she was ignored. Petitioner reminded the judge of this fact during on the day the judge denied Petitioners motion to recuse and dismissed her case. Petitioner stated to the judge, "And it is unfortunate that you would not recall the comments you made to me inasmuch as I did request a court reporter. When we were in this courtroom, we were led to the back, and I said I wanted to stay in here so that everything could be on the record. Now it is a matter of the judge's word against my word about what was said, and to me that is the danger of not having a court reporter specifically--especially when I asked for it because I knew on appeal I [would] need something on the record to cite. And now it is going to be a judge said, a litigant said, and I don't appreciated that. (Tr. of 11/13/2001 at page 6 and 7).

28 U.S.C § 753 (b)(3) "Reporters" states in relevant part:

Each session of the court and every other proceeding designated by rule or order by rule or order of the court or by one of the judges shall be record verbatim...Proceedings to be recorded under this section include....(3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be *requested by any party to the proceeding.* (emphasis added)

Petitioner was not able to complete and file a

complaint of Judicial Misconduct" against the judge due to the fact that the judge dismissed her case before Petitioner had an opportunity to do so.

Petitioner's primary complaint was the various rulings the judge refused to put on the record because it prevented Petitioner from objecting on the record and the Judge provided the defendants with a roadmap of what she was going to allow them to use, allowing in those exhibits which would be helpful to defendants and excluding those which would not. She didn't cover the entire list of exhibits. She did some before she appeared to become disgusted with discussing the the exhibits. The following are just two examples of her rulings.

The judge allowed Mr. Kumar to withdraw exhibits 60 and 61 from his exhibit list. The exhibits purport to show Petitioner would have lost her job at the school on or around October 4 of 1994 even if she hadn't been displaced by her principal, due to declining enrollment, that there had been a loss of approximately 39 students. The argument he was attempting to make was that Petitioner would have lost only a little over a thousand dollars in salary rather than closer to the ten thousand dollars the Petitioner claims she lost when her salary was cut nearly in half when Bradley displaced her from her teaching position and she worked for the next six months in a lesser position until she wasbetween the time she was hired by another principal at another school.

But Petitioner pointed out that Mr. Kumar's new argument was in direct opposition to his former argument made in open court when Petitioner had presented a motion to compel production of the school budget. Petitioner renewed her motion,orally, for discovery on a

limited basis to ascertain just who these 39 students were.

Although no court reporter was present to record this ruling made by the judge, Mr. Kumar referred to it in open court when Petitioner renewed her motion for discovey on a limited basis to find out who these alleged 39 students actually were. Mr. Kumar said, "Your Honor, we asked that this motion be denied just as the Court denied it the last time we were before you for the pretrial conference. As your Honor will recall, plaintiff raised it at that time, and our position was essentially the same, it had already been addressed and denied by the magistrate.

In addition, when we were before you, the motion was rendered moot because the board withdrew the two exhibits that were a source of contention..." (Tr. of 8/28/01 at pages 2 and 3).

The judge also told defendants she would allow them to use some photocopied notes of defendant Blondean Davis even in the face of an objection from Petitioner that she had motioned to compel the production of Davis' original notes she allegedly had taken when Petitioner reported to Davis that she was being sexually harassed by Bradley. Petitioner pointed out the fact that Davis, in her deposition, had admitted that the notes still existed. Robinson said the contents of the photocopied notes were different that the original notes which she witnessed Davis write. Rather than sexual harassment, the contents of the photocopied notes talk about something different. The magistrate judge had granted Petitioner's motion to compel and ordered the petitioner to produce the notes or an affidavit explaining why they could not.

On July 25, 2001, the day of the pretrial conference,

Judge Lefkow assured counsel for defendants, Sunil Kumar that she would be granting defendants' motions in limine including their first motion asking the judge to dismiss individual defendants Davis and Bradley. This was dispite the fact that she had given Petitioner permission to respond in writing to the motions.

A few days after the judge gave her assurance that the motions would be granted, individual defendant, Davis abruptly resigned her employment with the Board. (*See* App.L at page 52a) Petitioner learned of her resignation from newpaper accounts and television coverage. Mr. Kumar never informed Petitioner of Davis' resignation and would not elaborate when Petitioner asked him to do so. Petitioner noted to the court in one of her pleadings that Davis had resigned from the Board.Petitioner obtained a copy of the "Personal Service Agreement" from the Board's Offices.

On or around October 17,2001, Petitioner received a call from Defendants' attorney, Sunil Kumar, stating that the pretrial conference set for the following day, October 18, 2001, a date which had been set months earlier in July, had to be changed because he was on trial in another case.

Petitioner noted that there were at least four attorneys assigned to the case. The court had granted defendants' motion for the additional attorney appearance of David A. Hemenway on May 17, 2001, shortly after the filing of the final pretrial order. Also defendants had added the appearance of Sherri Thornton about two weeks after the pretrial conference of July 25, 2001.

Mr. Kumar insisted that none of the Board lawyers could attend the pretrial because they would all be busy.

He stated that he was under an order from another judge and that he would not be able to leave that judge's court just to attend a pretrial conference with Petitioner. He left a message for Petitioner that he was filing an emergency motion to change the October 18, 2001 pretrial hearing.

The next time Petitioner heard from Mr. Kumar he stated that the new hearing date was scheduled for October 24, 2001. Then, again, the hearing was postponed until still yet, a later date, November 7, 2001 because Mr. Sumar explained that the current trial he was conducting was going longer than he had expected and November 7 was the earliest date Judge Lefkow had available.. Mr.Kumar left a message for Petitioner on her telephone that if she objected to the change in dates that Judge Lefkow and her clerk, Michael Dooley didn't want Petitioner to object in writing about the change in dates.

On the afternoon of October 24, 2001, the hearing date that had been rescheduled at the requested of Mr. Sumar, the Board of Education held its monthly Board meeting. Marilyn Johnson, head attorney for the Board and an attorney of record on this case was in attendance as usual. At this meeting, the Board voted in Executive session to terminate a John Bradley. No details were given as to when and if the proposed termination would take place as principals are now chosen by local school councils and it is they who usually have the final say in such matters. Petitioner was unable to get a straight answer from Mr. Kumar as to whether it was the same John Bradley, the defendant in her case.

During Petitioner's motion to correct the official record in which she attempted to clarify that she had not agreed to the change in dates of the pretrial conference, she

offered a copy of the recorded telephone message in which Mr. Kumar had stated that the judge and her clerk didn't want a written objection to the change in dates. The court expressed no interest in a copy of the tape. Petitoner said, "...I have a recording of his [Mr. Kumar] message to me if you would like to have it. If not, I'll take it back." (Tr. of 11/5/01 page 2). Even though the Board is located across the street from the Courthouse, less than two minutes away by foot, Mr. Kumar did not attend the hearing to refute Petitioner's allegations, nor for that matter, did Judge Lefkow deny that she had said that she preferred not to have anything in writing about the change in dates of the pretrial conference.

At this hearing Petitioner wanted to secure an alternate date for the hearing but the judge stated that she would change it only by agreement with defense counsel. Needless to say, having maniputated Petitioner into an unfavorable time schedule for trial, defendants declined to agree to an alternate date.

Judge Lefkow said, "Well, you know, I'm not going to move the trial date. I'm not going to move the pretrial date or anything until Mr.Kumar and you are together on this. And he's not here today, unfortunately. But if I move this, then I'm messing up his life just the way I messed yours up, so-- (Tr. of 11/05/01 at page 7).

Petitioner attempted to explain to the court how the two changes by Mr. Sumar pushing back the date of the pretrial hearing, had caused problems for her in terms of trial. It was to no avail.

It was probably at this point when it became increasing clearer to Petitioner that the judge was not going

to be even handed in her consideration for both parties. Where she had allowed Mr. Kumar to change the pretrial hearing not once, but twice, without agreement of Petitioner, she would not even consider doing the same for Robinson without the agreement of Mr. Kumar through a telephone conference.

Petitioner thought that it was no longer prudent to continue before this judge. She called the judge's clerk to inform him that she would not be going foward with the rescheduled pretrial hearing nor the trial pending the outcomes of a motion to recuse the judge and the filing of a complaint for judicial misconduct. The clerk informed Robinson that she would have to put something in writing so the judge would know why she would not be proceeding further.

The Petitioner created a "Notice to the Court" explaining why she would not be proceeding any further at that time. (See App J at 49a). This document is now conspicuously absent from the case file in the court and Petitioner has been told she would have to pay to have it searched for. Also parculiar is the fact that this document is noted on the docket as *defendants'* notice to the court. Petitioner delivered this more than one copy of this notice to the Judge Lefkow's office.

A couple of days later on November 7, 2001, on the new date set for the pretrial conference Judge Lefkow sent for Mr. Kumar who had been notified by Petitioner that she would not be proceeding any further before filing a motion to recuse the judge. During this "hearing" she spoke with Mr Kumar about Petitioner's actions. The judge said, "Well, I suspect that if she doesn't appear for trial and I dismiss, there will be an appeal, and that's the thing that

may end up. And you will have to try this at a later date anyway." (Tr.of 11/07/2001 at pages 8 - 9)

It was also on this day that Mr. Sumar tendered to the Judge the second motion in limine that Petitioner claims was never served upon her.

COURT: Was there a second motion in limine? I only got the first, third, fourth, fifth, and sixth.

MR.KUMAR: Yes, there was, Your Honor. But I don't believe plaintiff filed a response to that second motion in limine. Or if she did, at least I don't have a copy of that.

COURT: Okay. (Tr. of 11/7/01 page 9).

On or around November 7, Petitioner was notified by phone and later by mail, that the trial would proceed on the scheduled date and that if she didn't appear her case would be dismissed.

On or around November 9, 2001, Petitioner filed her recusal motion setting it to be heard on November 19, 2001. Petitioner didn't think it mattered that this was past the trial date since she no longer planned to go foward. Additionally, she was preparing a "Complaint of Judicial Misconduct" and she needed time to get transcripts and other documents to in support of her motion and complaint.

On November 13, 2001, Petitioner appeared in court. When the case was called, she reminded the judge that she had a recusal motion pending and that she was not prepared to go to trial. The judge stated that she would not be sitting on that date and that she would have to change

Petitioner's recusal hearing to another date. Instead of scheduling the recusal motion for a later date, the judge decided to rule on the motion on that day even thought she had not informed Petitioner she would be doing so. In referring to Petitioner's recusal motion the judge said, "I can't say that I have any specific memeory of anything that was said in the coversation, but I doubt I would have such a thing because it is my job to hear your lawsuit."

She further stated, "So I am not going to allow you to continue the trial. I'll deny your motion to recuse because I do not believe in any sense that I am biased against you." She went on to say, "And, you know, you can take--you're free to take whatever action you wish to take. But to me it seems more of a--well, I won't say anything about what your motives are. I'm sure your motives are honest and so on. But in this courthouse to get a trial date is a precious thing, and you have to be ready to go. It is not up to either party to tell the Court when a case is going to trial. So it is going to be called today. And if you don"t go foward, I'm going to dismiss." (Tr. of 11/13/01 at page 5)

Petitioner then spoke, "Well, your Honor, just to clarify the record, I really was not prepared to argue the 455 motion today, and I did not bring the necessary materials to argue that. And I would think that it was inappropriate to do so. " Robinson said, "...just for one example, not allowing Jacqueline Baker to be called as a witness..." where Robinson attempted to explain the importance of that particular witness. (Tr. of 11/13/01 at page 8).

Robinson ended by reiterating the fact that she did not feel she could receive a fair trial before the judge. The

judge then dismissed the case for "failure" to proceed.

## REASONS FOR GRANTING THE WRIT

### I.

### The Seventh Circuit Court Of Appeals Requirement Of A Writ Of Mandamus As The Sole Method Of Challenging A Judge's Refusal To Recuse Himself Under 28 U.S.C. § 455 (a) Conflicts With All The Other Circuits In The Nation.

In *U.S. v. Ruzzano*, 247 F.3d 688 (7th Cir. 2001), the Court of Appeals, Kanne, Circuit Judge discusses the Seventh Circuit's view of recusal under 28 U.S.C. § 455(a). Kanne acknowledges, "In this circuit, appellate review of a judge's failure to disqualify herself under § 455(a) may only be obtained by petitioning the appellate court for a writ of mandamus prior to trial.

He further states, "Our cases have reasoned that

> "[I]t is a fundamental principle of appellate review that unless an error affects the substantial rights of the appellant, it is not a basis for reversal....[I]f a judge proceeds in a case when there is (only) an appearance of impropriety in his doing so, the injury is to the judicial system as a whole and not to the substantial rights of the parties The parties receive a fair trial, even though a reasonable member of the public might be in doubt as to its fairness because of misleading appearances." Once the proceedings in the district court are complete, the harm sought to be avoided by the

requirement of recusal for appearance of impropriety has been done--the public image of the judiciary has already been damaged.

*United States v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989) (quoting *Balistrieri*, 779 F.2d at 1204-5; other citations omitted). While we recognize that this is a minority position, *see United States v. Boyd*, 208 F.3d 638, 650 (7th Cir. 2000) (Ripple, J. dissenting) (arguing that this circuit's requirement of mandamus is in "considerable tension" with the Supreme Court's decisions in *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed2d 474 (1994), and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1998), *cert. granted in part and judgment vacated on other grounds by*__U.S.__, 121 S.Ct.1073, 148 L.Ed.2d949 (2001), it remains the law in this circuit. *See id.* at 645.

Due to the position of the Seventh Circuit on this matter, the judge in this case, the Honorable Judge Joan Humphrey Lefkow, was able to sandbag the petitioner in this action. By calling the recusal motion prior to the date set for hearing it, the Judge was able to rule on the motion, refuse to recuse herself, then during the same hearing, order the petitioner to go foward with her case or have it dismissed. Under these circumstances, petitioner had no opportunity to secure the writ of mandamus needed to challenge the judge's refusal to recuse herself. But for this inconsistency of the Seventh Circuit with the other circuits, this judge could not have finessed the outcome in the manner in which she did.

**II.**

**The Decisions Of The Seventh Circuit Adversely Impact And Eliminate A Remedy For The Appearance Of Judicial Bias For Litigants In The Seventh Circuit**

Litigants of the Seventh Circuit are subjected to the unfair requirement of losing a chance on appeal to challenge a judge's denial of a motion to recuse himself as prescribed by U.S.C. § 455 (a) other than by a writ of mandamus. Geographical location should not determine what remedies are available for litigants in terms of securing a fair and impartial tribunal. Petitioner is prejudiced by the fact that she lives in a Judicial Circuit that is not in sync with other Circuits.

As discussed above, no other circuit in this nation has the same requirement. The Supreme Court should accept *certiorari*, and bring the Seventh Circuit into compliance with, other Circuit Courts of Appeal, as well as with this Court's decisions in *Liteky v. United States*, 510 U.S. 540 and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847.

**III.**

**The Decision Of The Seventh Circuit Is Incorrect.**

The Court of Appeals decision in regards to this action is incorrect because it failed to consider factors which were essential for a more reasoned analysis.

In *Moffett v. Illinois State Board of Education* 236 F.3d 868 (7th Cir. 2001), the Appellate Court stated, "So long as the district judge's analysis was not tainted by a

legal error or the failure to consider an essential factor, *see Kruger v. Apfel,* 214 F.3d 784, 786 (7th Cir.2000)(per curiam), we will reverse only if no reasonable person could concur in the district judge's decision or, put another way, only if the decision strikes us as fundamentally wrong, *In re Bluestein & Co.*, 68 F.3d 1022,1025 (7th Cir. 1995 (per curiam)

The Appellate Court erred when it stated in its opinion that none of Petitioner's challenges to predismissal decisions could affect the outcome of the case. Petitioner strongly disagrees for it was due to these challenges that Petitioner could *not* proceed. Had not the Court exercised its option not to hear oral argument from Petitioner, she could have explained how the judge's acts were prejudicial to her case.

Perhaps the most glaring error was Judge Lefkow's dismissal of the individual defendants Bradley and Davis. The Appellate Court opined, "By taking matters into her own hands, Robinson forteited all her claims."

Petitioner has an opposing view. She feels that by not going foward she might be able to *save* her claims for on appeal she would be able to explain that the dismissal of the individual defendants which was in violation of FRCP 54 (b) absent the two elements required by the rule-- an express determination and a certification.

When Judge Lefkow dismissed the idividual defendants, she, for all practical purposes, took away Petitioner's rights to be fully compensated for her injuries. The former judge in this case decided correctly that punitive damages against a municipal entity is not allowed under Title VII and he struck Petitioner's demand for

punitive damages. However, Petitioner *is* entitled to punitive as well as other damages from Davis and Bradley in their individual capacities. In her complaint, Robinson had named the defendants in both their official and individual capacities. Petitioner made it clear in the final pretrial order that she was asserting a Section 1983 claim against the individual defendants rather than the Board.

Also, although Petitioner's claim for retaliation was dismissed as a state claim, it does not stand to reason that it would or should be dismissed due to the one year statute of limitations for filing a claim of retaliation in a state action, where the time factor under Title VII is different than that of a state claim.

Petitioner had great concerns that if she proceeded in the lawsuit without all the necessary parties, that she would not be able to bring them back into the action at a later time due to the statute of limitations would surely have expired and Robinson clearly did not want to risk losing this right.

Also the Appellate Court should have considered the severity of the sanction of imposed by the judge. In *Owen v. Wangerin*, F.2d 312 (7th Cir. 1993) The court opined:

"Dismissal for failure to prosecute is reviewed with deference to the trial court's discretion. However, we recognize that dismissal for failure to prosecute is a harsh remedy that is reserved for extreme cases. In a case involving dimissal for failure to prosecute we said:

A dismissal with prejudice is a harsh sanction which should usually be employed only in extreme situations, when there is a clear record of delay or

contumacious conduct, of when other less drastic sanctions have proven unavailing..."The sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a *careful* exercise of discretion."

Defendants attempted to argue that Petitioner was guilty of such conduct by pointing to a footnote in the district court's opinion by the former judge in this action. (See App. E page 9a, footnote FN1) in which the judge mentions that Petitioner filed her objections to the magistrate's R & R more than a month after the 10 day deadline. While this is true Defendant well knows the circumstances regarding that situation. The record clearly indicates that Robinson had filed a motion for an extention of time to file the response. The motion was pushed back to a later date because, according to the judge's clerk, the judge would not be available. When Robinson showed up on the day the court had rescheduled the motion the judge was unaware that Petitioner had even filed a motion. The clerk explained that Robinson had filed a motion and there was some confusion in regards to it. Because Petitioner had to wait and see wether the court would approve the extension of time to file. The court granted the motion so as not to penalize Petitioner for the mix-up.

This hardly qualifies as clear pattern of delay. The record reflects that Petitioner, in the six years this case has been pending, has never missed a court hearing of which she was aware. The first one she missed was the one that is in dispute

A look at the record will reveal that Petitioner has never allowed her case to lie dormant. She has prosecuted it at all times during its pendency in court. Petitioner has deposed approximately 24 witnesses at great cost just to

get the information she needed to prove her case.

She has filed many motions to compel evidence as the Defendants have stonewalled her at every turn. In fact, Petitioner's first request to produce in which she asked for only two documents from her personnel file resulted in the Board's moving for a protective order, which the court granted. One of the documents Petitioner was requesting was a classroom observation report that she alleges in her complaint that Bradley removed it and replaced it with a bogus document in order to justify a lowered performance rating he issued to Petitioner. It was never produced. Defendants filed an affidavits stating they were unable to find the document.

Another factor which needed to be considered by the Appellate Court was whether Robinson's complaint stated claims under section 1983 and retaliation in violation of Title VII. Again, it was important for the court to settle this issue in order to decide whether the Judge abused her discretion in dismissing the individual defendants on the eve of trial.

Petitioner addressed this issue at length in her appellate brief. Her basic contention was that she had alleged the two allegations necessary to state a claim-- that the individual had deprived her of a federal right and that it was obvious that the defendants were state actors. Furthemore she had alleged in her complaint after describing all the acts by defendants. "All Defendants acted with deliberate indifference and callous disregard for the safety of Plaintiff and her constitutional rights." (Plaintiff's complaint at para. 42 ) Petitioner reasons that although she did not include the phrase "Section 1983" in her complaint, she certainly pointed to the constitutional

provision of the Equal Protection Clause.

Thus, under Rule 8(a)(2), a "statement of the claim" is sufficient "so long as a plaintiff colorably states facts which, if proven, would entitle him to relief *Adam v. Bain* 697 F,2d 1213m1216 (4th Cir. 1982), and the claimant "need not set forth any theory or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it on any theory." *New Amsterdam Casualty Co v. Waller*, 323 F.2d 20, 24-25 (4th Cir. 1963), *cert. denied*,376 U.S. 963.

In *Mitchell v. Maynard*, 80 F.3d at 1450 (10th Circuit), the Court informed:

We are also mindful that "charges of misconduct or prejudice leveled at trial judges 'should not be lightly made and, once made, should not be casually treated by a reviewing Court'"

There is no indication whatsoever that the Appellate Court considered Petitioner's recusal motion and affidavit at all. In fact they suggested that since the judge was correct in dimissing the lawsuit, that there was no need to do

Judge Lefkow's reasoning in refusing to disqualify herself, "I don't believe in any sense that I am biased against you." is the wrong standard for deciding whether a judge is thought to be impartial. While this may have been correct under the old standard for a judge to decide his own impartiality, the revised statute requires a "reasonable person" having knowledge of all the facts...

Judicial rulings alone almost never constitute a valid basis for bias or partiality motion, as judicial rulings (1) cannot possibly show reliance upon extrajudicial source,(2) can only in rarest circumstances evidence required degree of favoritism or antagonism when no extrajudicial source is involved. Opinions formed by judge on basis of facts introduced or evidence occurring in the course of current proceedins or of prior proceedings do not constitute basis for bias or partiality motion unless such opinions display deep-seated favoritism or antagonism that would make fair judgment impossible; thus, judicial remarks during the course of trial are critical or disapproving of, or even hostile to, counsel, parties, or their cases, ordinarily do not support bias or partiality challenge, but such remarks (1) may do so if they reveal an opinion that derives from extrajudicial source, and (2) will do if they reveal such high degree of favoritism or antagonism as to make a fair judgment impossible. *Liteky v. United States*, (1994) 510 US 540.

The judge made rulings in this case that seem biased. Just to cite a few examples:

She would not allow the testimony of Victor Gonzalez, Petitioner's union field representative, that Petitioner had complained to him about sexual harassment rather than to her own school union rep, Mary Harrington, who gave an affidavit in support of defendant Bradley (App. F at 29a)

Additionally, Jacqueline Baker from the Board's Department of Human Resources testified in her deposition that she could not confirm, as Defendants contend, that she received three letters of reprimands issued in one day regarding alleged misconduct of some sort regarding

Petitioner. She commented that it looked like someone was trying to make create a paper trail. Defendants objected to Petitioner calling this employee although they plan to use these letters as exhibits as proof of Petitioner's alleged poor behavior. Mrs. Baker had to be subpeonaed when the Board refused to produce her.

The judge ruled former Board employee, Vicki Williams may be called only in rebuttal if defendants offered evidence concerning them that the witnesses would contradict. Petitioner had planned to call Mrs. Williams to testify that Petitioner had three regular teaching certificate and that they were maintained at all times in the Board's vault. The Board had alleged to the EEOC that Petitioner did not possess a teaching certificate and that was the reason for her displacement. Mrs. Williams was later fired and the Board objected to Petitioner calling her as a witness. Stating that she can be called in rebuttal is the same as saying she can't be called as it is highly unlikely that the Board is going to call her to contradict the statement they made to the EEOC

Defendants objected to the majority of Petitioner's witnesses, most of whom were their own employees. They even objected to EEOC investigator, Charles Bold, who entered a "no cause" determination in their favor because they are no longer making that argument. The argument has shifted basically to Petitioner was a bad employee.

In this case it is quite probable that the judge was influenced by high profile sexual harassment cases. The fact that she told plaintiff, "These cases are nothing but he said, she said." How many times did the public hear that

phrase during these highly publicized cases?

## IV.

### The Practice Of "Jurist Nullification" Needs To Be Addressed.

This is a case in which the judge appears to have indulged in "jurist nullification". Petitioner is not certain that such a term exists(it's similar to jury nullification but it's the judge rather than the jury) but what she is attempting to say is that this is a judge who seems unable or unwilling to put aside her personal feelings about the subject matter of this lawsuit and has decided that she is going to crush every lawsuit of this nature that comes across the threshhold of her courtroom door.

Knowing how this judge feels about sexual harassment, future litigants, particulary defendants, will beat a path to her courtroom. Plaintiffs in such cases, on the other hand, want to head in the opposite direction.

Although Petitioner did mention former President, Bill Clinton in her Appellate Reply Brief, she certainly did not make the argument that *any* judge appointed by Bill Clinton could not be fair in a sexual harassment lawsuit. Petitioner would feel quite comfortable having her case heard by such a judge as long as he exhibited no outward bias as did the Judge Lefkow.

It was only when defendants argued about the extrajudicial source factor being present in order for a judge to be considered for actual biased that the Petitioner

went off in an attempt to see if, indeed there was something outside the case that could have influenced the judge's apparent animosity against sexual harassment plaintiffs and cases. It is common for human beings to form opinions bases on their own life experiences. For example if one of the judges daughter came home and told the judge she had been fired because she would not have sex with her boss, would the judge advise her daughter not to file a lawsuit because it would be a waste of a court's time? Petitioner does not believe that would be the case. The judge's perception then may shift with the circumstances.

The only information Petitioner was able to find was a short biographical sketch in which it was mentioned that the judge had been appointed by the former President in the year 2000. Frankly, it was as if the lightbulb came on immediately. For petitoner, it seemed quite plausible that the judge felt some degree of sympathy as well as loyalty to a man who was arguably the most powerful man in the world at some point in his life and who had appointed her to a lifetime job.

If she did feel that way, she was by no means alone. Most Americans would have to feel some degree of sympathy for Bill Clinton. Where most who are charged with such allegations are allowed to vindicate themselves in a court of law, the president was put in a position of having his case determine by the court of public opinion. Petitioner suggested that the timing of the judge's appointment was around the same time he was dealing with the Paula Jones, Monica Lewinsky scandal and a reasonable person could believe that the judge did have some opinion about it. Can one honestly say that the judge never gave the scandal a thought? Surely she was not

happy to see this happening to him.

## V.

### Individual Perpetrators Should Assume Liability For Their Actions Rather Than Have Their Employer Shoulder The Burden.

As employers, the city of Chicago and the Board of Education are responsible for the acts of their employees under Title VII. This imposes a heavy financial burden on public resources for legal fees and and other expenses to defend lawsuits. In some cases, such as this one, the employer must, by law, insure or indemnify and protect employees against financial loss and expense arising out of suits alleging violations of civil rights. *See* Illinois Compiled Statutes 105 ILSC 5/34-18.1 "Protection From Suit".

While petitioner has worked tirelessly, and at great expense to prosecute her case, individual defendants Bradley and Davis have had the luxury of having their legal expenses taken care of by petitioner's employer.

This the case even though both individual defendants are capable of footing the bill for their own legal costs. Davis' new position keeps her income in the six figure bracket as is was when she worked for the Board. Bradley, if still employed by the Board earns a considerable salary also.

It is public knowledge that the Board of Education of the City of Chicago is the second largest employer in the state of Illinois. It's failure to to protect its employees from sex discrimination will undoubtedly lead to the filing of

more lawsuits thereby clogging the court's docket even further.

These two individuals were let off the hook by Judge Lefkow. The only way Pettitioner can bring them back before the Court is by the granting of Petitioner's petition for a writ of certiorari. The Appellate Court's ruling should be reversed and remanded so that Petitioner at least has a chance to get Judge Lefkows rulings vacated. Otherwise we will just have two more lawbreakers who didn't have to worry about paying to get justice or, in this instance, injustice.

In petitioner's Second Amended Complaint filed February 10 1997, she relates in ¶13 of her complaint:

> 13. Then in an apparent reference to Supreme Court Justice Clarence Thomas, he said, "At least we now have support in the courts for women like you." The Defendant [Principal John H. Bradley, Jr.] became less aggressive when the Plaintiff stated it was she who would seek help from the courts if he didn't stop harassing her

*See* Appendix E at page 13a.

It is so surreal that more than five years later petitioner's fate now rests partially in the hands of a judge deemed, by the defendant, to be unsupportive to victims of sexual harassment. Petitioner can only hope that defendant is wrong in his perception. Petitioner would hope that the court would unanimously agree to grant her petiton because maintaining the integrity of the court system is a worthwhile endeavor. And when even one judicial officer acts innappropriately it reflects poorly on those judges

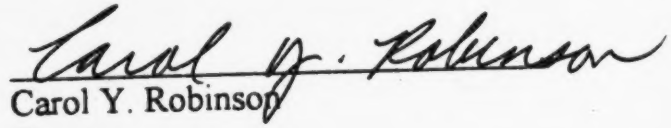
whose reputations are beyond reproach.

Petitioner was basically denied an opportunity to argue her motion for recusal when it was called unexpectedly before its scheduled date of hearing where she was obviously unprepared to address it. Petitioner then was silenced by the Appellate Court when it exercised its option not to hear oral argument of petitioner's appeal. And now this Honorable Court is Petitioner's last resort. She prays it will grant her permission to be heard.

## CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Carol Y. Robinson
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## APPENDIX A

**United States Court of Appeals**
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITHOUT ORAL ARGUMENT

**Date: June 14, 2002**

**BEFORE:** Honorable Frank H. Easterbrook, Circuit Judge
Honorable Diane P. Wood, Circuit Judge
Honorable Anne Claire Williams, Circuit Judge

No. 01-4249
Carol Y. Robinson,
Plaintiff - Appellant

v.

Board of Education of the City of Chicago, Illinois, John H. Bradley, Jr., Principal, and Blondean Davis,
Defendants - Appellees

Appeal from the United States District Court for the Northern District of Illinois, Easter Division No. 99 c 92, Joan Humphrey Lefkow, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1060 - 110393)

## APPENDIX B

**UNPUBLISHED ORDER**
Not to be cited per Circuit Rule 53

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
Chicago, Illinois 60604
Submitted June 5, 2002*
Decided June 14, 2002

Before

**Hon.** FRANK H. EASTERBROOK, Circuit Judge
**Hon.** DIANE P. WOOD, Circuit Judge
**Hon.** ANN CLAIRE WILLIAMS, Circuit Judge

CAROL Y. ROBINSON
*Plaintiff- Appellant,*

No. 01-4249 v.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO, *et al.*,
*Defendants-Appellees*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 92--Joan Humphrey Lefkow, *Judge*.

**Order**

Plaintiff Carol Robinson's suit rests on Title VII of the Civil Rights Act of 1964. She accuses the principal of

the school where she taught of sexual harassment that was sufficiently severe to be sex discrimination, and of retaliation when she complained. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Settlement talks conducted by the district judge failed. Robinson believes that during these talks the district judge disparaged her chances of success and thus must be biased against her claim. Less than a week before trial was to commence, Robinson filed a motion under 28 U.S.C. §455, adding that she would not participate further in the litigation unless a new judge were assigned to the case. The judge responded with an order declining to alter the trial date and warning Robinson that her case would be dismissed if she declined to introduce evidence. On the day set for trial, Robinson carried out her threat. The judge denied from the bench Robinson's motion for recusal and gave her an opportunity to proceed with the trial, for the defendants and their witnesses were in court and anxious to have the matter resolved. When Robinson still refused, the judge dismissed the case for want of prosecution.

It was unnecessary for the judge to grant a continuance so that Robinson could seek a writ of mandamus requiring the judge to recuse herself. The trial date had been set four months in advance to allow witnesses to arrange their schedules; the judge's schedule also was congested, and a last-minute change would have done a disservice to all concerned. Robinson was free to try the case and, if she lost, to raise on appeal any claim of actual bias. See *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Although we normally require appearance-of-impropriety claims to be raised before trial by petition for mandamus, *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975 (7th Cir. 2001), we shall assume that a motion denied only on the date of trial is exempt from that requirement. See *United States v. Ruzzano*, 247 F.3d 688,

694 (7th Cir. 2001). (This assumption may be unduly favorable to Robinson; if the reason why the motion was denied on the trial date is that its filing had been unreasonably delayed, then perhaps her §455 contention is simply forfeited.) Still, there is no possible problem here of either actual or apparent bias. A judge is free to comment about evidence that she has gleaned from the record, see *Liteky v. United States*, 510 U.S. 540 (1994), and it is normal in settlement negotiations to inform each side of the weaknesses of its position. No reasonable and fully informed person (the right standard, see *Liteky*) could infer from this that the judge would fail to preside impartially at trial. Robinson also contends that no district judge appointed by President Clinton can be impartial in a sexual-harassment case. That specious argument requires no analysis. See *In re Executive Office of the President*, 215 F.3d 25 (D.C. Cir. 2000).

Because the case was properly dismissed for want of prosecution none of Robinson's other challenges to pre-dismissal decisions could affect the outcome, and we do not discuss them. Even had all Robinson's claims and proposed lines of proof survived to the date of trial, the whole case would have been resolved just as it was. A party who does not agree with a judge's rulings must litigate the case to conclusion and appeal from any adverse decision. By taking matters into her own hands, Robinson forfeited all her claims.

AFFIRMED

no signature

## APPENDIX C

**UNITED STATES DISTRICT COURT**
Northern District of Illinois
Eastern Division

Carole Y. Robinson — Judgment in a Civil Case

v. — Case Number: 96 C 92

Board of Education of
the City o f Chicago

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

___ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that case is dismissed with prejudice.

Michael W. Dobbins, Clerk of Court

Date: 11/13/2001 — (no signature)

Michael Dooley, Deputy Clerk

## APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Robinson

Case 96 C 92
Joan H. Lefkow
11/13/2001

vs.

Board of Education of the City of Chicago

Docket Entry:
(10) [Other docket entry] Case called for trial on November 13, 2001 at 10:00 a.m. Carol Y. Robinson appearing pro se, Sunil Kumar and Sherri Thorton appearing for defendant. Plaintiff having indicated that she will not be going foward with the trial as scheduled, case is dimissed for failure to proceed. Plaintiff's motion to recuse/disqualification is denied for reasons stated on the record.

__Notices mailed by judge's staff.
number of notices - 2
date mailed notice - 11/13/2001

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Carol Y. Robinson, | ) | |
| | ) | |
| Plaintiff, | ) | No. 96 C 92 |
| | ) | |
| v. | ) | Judge John A. Nordberg |
| | ) | |
| Board of Education of the City of Chicago, *et al.*, | ) | Magistrate Judge Martin C. Ashman |
| | ) | |
| Defendants | ) | |

### MEMORANDUM OPINION AND ORDER

*1 Plaintiff Carol Robinson is a school teacher who alleges she was sexually harasssed by the principal while working at Scanlan Elementary School. She is proceeding *pro se* and has sued the Chicago School Reform Board of Trustees, Dr. Blondean Davis, and John H. Bradley, Jr. in her second amended complaint, she asserts a federal claim under Title VII and various state law claims.

Defendants have moved for summary judgment on all counts. On February 3, 1999, Magistrate Judge Ashman issued a Report and Recommendation("R & R), in which he recommended granting summary judgment in favor of defendants on all counts. Plaintiff filed objections to the R & R. Under Rule 72(b), this court must make a *de novo* determination of the magistrate judge's recommendations and proposed findings of fact. Having reviewed plaintiff's

objections, the defendants' response, and the supporting record, this court grants sumary judgment in favor of the defendants on all the state law counts, but denies summary judgment on plaintiff's quid pro quo Title VII sexual harassment claim.

## DISCUSSION

I. Points of Agreement With R & R.

With one important exception discussed below, this court agrees with and adopts the recommendations and analysis in the R & R. There are four main points of agreement. First, the magistrate judge concluded that all the state law counts were defective under a number of doctrines, including the statute of limitations and preemption. (*See* R & R at 10-16.) Second, the magistrate judge concluded that plaintiff's Title VII claim based on the theory of a hostile work environment was insufficient because the alleged acts or harassment were not severe or pervasive enough to create an abusive working environment. (*See id.* at 6-8.)

Third, the magistrate judge concluded that a number of the alleged acts of harassment were time-barred. (*See id.* at 4-6.) In her complaint, plaintiff describes a number of events stretching back to sometime before 1993 and continuing until the fall of 1994. Plaintiff filed her charge with the EEOC on April 21, 1995. Therefore, under the applicable law, she can only sue for any alleged acts of discrimination that occurred 300 days prior to this date, which would be those prior to June 25, 1994. In addition, the magistrate judge rejected plaintiff's argument that the time-barred acts could be salvaged under the continuing violation doctrine, concluding that plaintiff clearly was aware that the alleged acts could constitute harassment given that she took "off a

day or two to explore the legal ramifications of sexual harassment." (*Id.* at 6.)

Fourth, the magistrate judge determined that plaintiff had failed to add a § 1983 claim to her second amended complaint, even though this court expressly granted her permission to add such a claim. (*Id.* at 10.) As a result, he did not address defendants' argument that such a claim was barred by the applicable statute of limitations. This court agrees with this conclusion and finds that, even granting her leeway as a result of her *pro se* status, plaintiff has failed to raise this claim in a timely manner and should not be allowed to do so now. [FN1]

> FN1. This court has given plaintiff some consideration in light of her *pro se* status in both this ruling (as discussed below) and elsewhere. For example, she filed her objections to the R & R more than a month after the 10-day deadline for filing such objections had passed. Nevertheless, this court granted her oral motion requestin permission tofile her objections after the deadline.

*2 In sum, the court agrees with and adopts the magistrate judge's analysis and recommendation regarding these four points. Taken together, they result in a grant of summary judgment to defendants on all claims except the Title VII quid pro quo claim. In particular, all claims against the individual defendants have been dismissed. [FN2]

> FN2. Peviously, in a minute order dated March 27, 1998, this court dismissed individual defendants Bradley and Davis from plaintiff's Title VII claim because they were not proper parties.

II. Point Of Disagreement With R & R--The Quid Pro Quo Sexual Harassment Claim.

This court now turns to the one point of disagreement with the R & R. The R & R concludes that there were no genuine issues of material fact regarding plaintiff's quid pro quo Title VII harassment claim. As noted above, the magistrate judge correctly held that plaintiff could not recover for certain time-barred acts. In doing so, however, he concluded that it was unnecessary to discuss the facts relating to those acts that occurred before the applicable cut-off date of June 25, 1994. Plaintiff complains that this decision resulted in a distorted, or at least incomplete, picture of her claims. She believes that the time-barred evidence supports her timely claim by providing context for interpreting the later events and by providing additional evidence that defendant Bradley had a sexual intent in mind. This court agrees.

Although it is true that plaintiff may not recover for acts committed before the cut-off, it does not follow that evidence of such acts may not be introduced in a trial concerning those acts that are timely. The Seventh Circuit has held that evidence concerning time-barred acts may be used as background evidence or evidence of discriminatory intent. *See Mathewson v. Nat'l Automatic Tool Co., Inc* 807 F.2d 87, 91 (7th Cir. 1986) ("it is well settled that evidence of earlier discriminatory conduct by an employer that is time-barred is nevertheless entirely, appropriate evidence to help prove a timely claim based on subsequent discriminatory conduct by the employer") *see also Knight v. Entertainment Publications, Inc.*, 1995 WL 583916, *3 (N.D.Ill. Sept. 26, 1995) ("Time-barred incidents of Title VII employment discrimination are not to be automatically erased from a case because of their tardiness. Although no relief can be obtained for time-barred acts, those acts may be used as background for a timely claim and may be probative evidence of an employer's intent.").

Accordingly, it will be helpful to summarize the facts of this case--including those before and after the cut-off date. The motion before the court is a summary judgment motion, which may be granted if there are no genuine issues of material facts and the movant is entitled to judgment as a matter of law. Fed.R.Civ. 56(c). Defendants have filed the motion, and they therefore bear the burden of establishing the absence of a genuine issue of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All inferences taken must be viewed in the light most favorable to the plaintiff, as she is the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Plaintiff, who is proceeding *pro se*, has relied primarily on the assertions in her complaint and in her deposition. Given the importance of her testimony, this court has cardfully reviewed her entire deposition transcript.

*3 Although this court will construe inferencesin favor of plaintiff, this court notes that defendants disputed many of plaintiff's assertions and no doubt will present an alternative interpretation of the events described below at trial. For example, this court notes for the record that defendants have submitted, in addition to other evidence, an affidavit of Mary Harrington, who was a school teacher for 30 years and who was the union delegate at Scanlan for twelve years. She testified that during this period she never received any complaint by any staff member, parent, or community member that Principal Bradley had ever acted inappropriately or in a sexually harassing way.

A. Factual Summary.

In 1986, Carol Robinson was hired by the Board as a full-time basis substitute teacher. She first worked at the Park Manor School but then was transferred to the Scanlan Elementary School later that year. She worked there until approximately September 1, 1994 when she was reassigned to a substitute cadre. [FN3] Defendant John Bradley began working as an assistant principal of Scanlan in 1989 and became principal of the school in 1993.

> FN3. On February 6, 1995, she was appointed a full-time teacher at Parker Community Academy. Three years later, she became tenured as an appointed full-time teacher. She has held that position ever since.

It appears that the beginning point of the acrimony between Robinson and Bradley was a comment Bradley allegedly made on the playground sometime before 1993. [FN4] Robinson alleges that she was walking around the playground during a play period for the students. It was either fall or spring and she had her jacket on and was walking between the fence and the field house to see what the children were doing. (Dep at 58.) Then, "out of nowhere," Bradley appeared and allegedly said: "Ms. Robinson, I think you are a very sensuous woman." (*Id.*) She told him that she did not approve of such a comment and asked him to apologize. She felt "extremely uncomfortable" and interpreted this remark as a "come on." (*Id.* at 59.) She says that Bradley later apologized for the comment and admitted that he should not have made it. ( *Id.*) [FN5]

FN4. In her deposition, Robinson could not pinpoint a specific date on which the comment was made but did say it took place early in Bradley's tenure when he was an assistant principal. (Dep at 57.)

FN5. Robinson also testified in her deposition that, in the fall of 1991, Bradley also commented on her dating choices and said tht she did not know "what a real man was" and that she was dating below herself. (Dep. at 65-66.) However, she testified that, unlike the "sensuous woman" comment, she did not consider these comments to be sexually harassing, although she did think they were offensive. (*Id.*)

In October of 1993 and in February of 1994, Bradley changed plaintiff's room assignment. The changes upset Robinson because she was inconvenienced, was moved to a fifth grade class despite the fact that most of her experience was at the primary grade level, and was forced to work in rooms in which there were not adequate supplies, in her opinion. (Complt. ¶11.) Shortly after the February room reassignment, Robinson confronted Bradley and told him that she believed that the frequent room changes were related to the "come on" she had "rebuffed" on the playground. (Dep at 56, 64; Cmplt. ¶ 12.) Bradley responded by stating: "I was just trying to compliment you, and you want to make a federal case out of it." (Dep. at 64.) He also allegedly stated something to the effect that "at least now we have support in the courts for women like you," which plaintiff believes was a reference to Clarence Thomas. (Cmplt. ¶ 13.) Plaintiff also claims that when she objected to the change in room assignments Bradley said the following: By the time I finish bouncing you

around this building you're gonna think you were a basketball. Then I'm gonna bounce your ass right out the door." (Dep. at 62-63; Cmplt. ¶ 12.) Around this same time period, plaintiff allegedly warned Principal Bradley that "she was prepared to take legal action against him if he persisted in such behaviors." (Cmplt. ¶ 14.) She also took "off a day or two to explore the legal ramifications of sexual harassment." ( *Id;* Dep. at 68.)

*4 Defendants state that Bradley changed Robinson's room at the request of another teacher who shared a room with Robinson and who complained that Robinson was not cooperating with her in "team teaching" a first grade class. That teacher, Rochelle Harris, signed an affidavit to this effect.

The remaining allegations primarily relate to two incidents --one in April and one in June of 1994. The April incident will be described, although it is outside the limitations period. It began when Bradley accused plaintiff of violating school policy for holding a parent-teacher conference in the hallway. (Dep. at 72-73; Cmplt. ¶ 16.) On a Friday, April 15th, he called Robinson into his office and told her he believed she had violated the policy. He noted that her colleagues had described her as "talented" and then suggested that if she "could use that talent to come up with something that might be gratifying for the both of [them], " then he would not "write her up" for the violation. (Dep. at 73; ¶ 16 ) He said she did not have to answer right then but had the "whole weekend to think about it" and that he would get back to her on the following Monday. (*Id*).

Sometime the next week, probably on the following Monday, Robinson saw Bradley, and he asked her "what [she] had decided." (Dep. at 77.) Although he did not say what he was referring to, she knew it was his suggestion from the previous Friday that she come up with something "gratifying for the both of them." She knew this because "there was nothing else that he had asked me to decide but that." (*Id.* at 78.) Although she did not say that he used any special tone of voice or body language, she did believe he was "asking for a sexual favor" by his use of the word "gratifying." (*Id.* at 79.)

She responded to his question by saying "not in this lifetime." (*Id.* at 78.) He then told her to "check [her] mailbox, " saying taht "he had created something especially for [her]." ( *Id.* at 78-79.) Later, when she did, there was a written reprimand about the parent-teacher conference. It was dated April 18th. ( *Id.* at 76.) Plaintiff implies that this type of reprimand was not usually given in writing but that after she complained to others about it, Bradley began issuing similar written reprimands to other teachers in order to cover up his behavior with her. (Cmplt. ¶¶ 18-25.) In short, she asserts that the reprimand letter was a trumped up document to punish her for not complying with what she describes in her complaint was an "implied" request for sex. (Cmplt. ¶ 16.)

Several months later, in June, a similar incident occurred. Again on a Friday, Bradley met with plaintiff in his office. It was the time of year for teacher evaluations. In the meeting, Bradley allegedly stated that he believed that

Robinson should be rated as a "superior" teacher (the highest rating she could be given), but that he had nothing in writing for her. (Dep. at 112.) Robinson requested her evaluation in writing, and then Bradley responded with what plaintiff interprets was a request for sex in return for a better job evaluation.

***5** Specifically, Robinson described this conversation in her deposition as follows:

And I said I think I do want something in writing. I want my evaluation. And then he said something about, well, how badly do you want it and what are you willing to do to get it or something. And I said what do you mean. And he said, you're a smart woman. You know what I mean And I said, well, what do you mean. And he just started being vague or would not give me a more clearer response, just that you're a smart woman. You know what I mean.

(Dep. at 112.) At another place in her deposition, she described the same incident in similar but slightly different terms:

We may have had a few words about that I'm entitled to an evaluation. But when he did not give me one, he said he had nothing in writing for me. After I had asked, he didn't give it to me. Yes, he wouldn't give it to me. I think I persisted. He insisted he wasn't going to give it to me. And he started talking silly again, or I consider it to be vague again about the weekend coming up and you can think about it. I took that to mean the same thing it meant way back in April. He said he wouldn't do the written

reprimand if I thought of something or whatever.

(Dep. at 113.) As he did in April, Bradley gave Robinson the "weekend to think it over." (Complt. ¶ 26.)

The next week plaintiff saw Bradley on one or more occasions in which they discussed this issue further. [FN6] She asked Bradley for her written performance rating. Later that day, the rating was in her mailbox. (Dep. at123; Cmplt. ¶ 27.) It was an "excellent" rating, one lower than the highest rating of "superior."

> FN6. In reading Robinson's deposition, it is not exactly clear how many conversations took place nor their exact date, although they all seem to have takent place sometime during this week.

Robinson approached Bradley and asked how he had arrived at the lower rating when he previously told her she would receive a higher rating. (Dep. at 123.) He told her to come back later and look in her mailbox. When she did, she found two "Classroom Teacher Observation Forms." He told her that he based her rating on those forms. She claims they were falsified documents because Bradley had only observed her in the classroom one time and that was in March of that year and neither of the Observation Forms were dated in March. ( *Id.* at 121-124.)

Plaintiff again confronted Bradley, probably in the hallway, and told him that the two forms were "bogus" because he had never observed her on those dates. (*Id.* at 125 ) As described by plaintiff in her deposition, Bradley responded to the accusations as follows:

He said something about I like to make things hard, don't you? And he was looking in the direction of his crotch. But I said, you know you didn't observe me or something like that. And he said, Ms. Robinson, I've observed you on many occasions, and I like what I see. And I took that to be sexual in nature, simply because he had not observed me in the classroom on many occasions.

(*Id.* at 125-126.) In her complaint, Robinson alleged that, when Bradley made the remark that he "liked what he saw," he also "slowly eyed [her] from head to toe." (Cmplt. ¶ 29.) Also, at some point during this time period, Bradley told Robinson that he was "going to get rid of her" but that it was not too late to save her job "if she wanted to be 'cooperative' with him." (Cmplt. ¶ 31; *see also* Dep at 128.) When she asked what he meant, he again "told her that she was a smart woman and that she knew what he meant. " (*Id.*)

*6 Sometime around September 1, 1994, plaintiff was released as a full-time basis substitue teacher and was reassigned as a substitute cadre effective September 7, 1994.

B. Analysis.

This court now turns to whether the facts stated above relating to the June incident are enough to survive summary judgment on a quid pro quo sexual harassment claim under Title VII. We start with the analysis of this claim in the R & R. The magistrate judge concluded that

the relevant allegations were contained in paragraph 31 of the complaint, which states as follows:

> On or around June 27, 1994, Bradley told Plaintiff that he was going to get rid of her, (remove her from her job) as soon as he could find a way to do so. He told her that it wasn't too late to save her job and get her former rating restored if she wanted to be "cooperative" with him. When Plaintiff asked what he meant he again told her that she was a smart woman and that knew what he meant.

(R & R at 9; Cmplt ¶ 31.) In concluding that such allegations were insufficient, the magistrate judge reasoned as follows:

> There is nothing about a bare statement that one be "cooperative" that immediately suggsts a sexual overture. Certainly body language, tone of voice, and so forth may transform an otherwise innocuous word or statement into a sexual innuendo, but there is no evidence that Bradley did anything other than say that Plaintiff be "cooperative" with him.

(R & R at 10.)

To summarize, the magistrate judge focused on the "bare statement" that Robinson should "be cooperative" and concluded that it could not be interpreted as a "sexual overture." When viewed in isolation, this remark is indeed ambiguous, and this court agrees that it would be difficult to conclude that the remark standing alone is enough for a reasonable jury to conclude that Bradley was making a sexual request. [FN7]

FN7. While we agree that the remark "be cooperative" is too ambiguous on its face to establish that the speaker had a sextual motive, it is not incompatible with such a motive either. Along this line, it is interesting to note that Judge Cudahy, in his concurring opinion in *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 504 (7th Cir.1997), specifically used the word "cooperation" in his general description of a quid pro quo harassment: "In a quid pro quo situation, a supervisor acts with actual or apparent authority when he promises employment goodies or threatens their withdrawal to extract sexual 'cooperation.'" Likewise, Judge Rovner used the word "gratification" in her general description of such a claim. *See Venters v. City of Delphi*, 123 F.3d 956, 976 (7th Cir. 1997) (noting that quid pro quo harassment is most familiar to us in the form or supervisors soliciting sexual gratification from their subordinates").

In this case, however, this court concludes that there is enough other evidence such that a reasonalble jury could interpret the remark as a sexual overture. In particular, as discussed below, this evidence consists of (i) the earlier incidents between Robinson and Bradley and (ii) various statements and gestures by Bradley during the same general time period as the "be cooperative" remark. This additional evidence, when considered along with the reasonable inferences in plaintiff's favor, creates a genuine issue of material fact that should be resolved by a jury.

1. Prior History Between the Parties

This case provides a good example of why it is important to allow a plaintiff to introduce evidence of acts outside the

limitations period even though she may not recover for them. In this case, the evidence concerning such time-barred acts could be relied on by a jury to find that the defendant indeed had a sexual or romantic interest in plaintiff. It also helps provide context and support for plaintiff's interpretation of the key events in June of 1994. The following three points are examples of such evidence.

*7 First, Robinson alleges that Bradley approached her in 1991 on the playground and told her he thought she was a "sensuous woman." The comment is clearly not job-related and clearly can be interpreted as evidence that Bradley had some kind of sexual attraction towards Bradley. Although the comment by itself may be minor and may not be sufficient to constitute harassment, it is nonetheless some evidence as to Bradley's general intent and frame of mind.

Second, in February of 1994, Robinson expressly told Bradley that she believed the earlier "sensuous woman" comment was a "come-on" and that she was exploring a claim of sexual harassment in light of the multiple room assignment changes. While these statements do not provide evidence of Bradley's intent, they do show that he was on notice that plaintiff believed he was sexually harassing her.

Third, plaintiff has alleged that Bradley approached her in April of 1994 and asked if she could come up with something "gratifying for the both of them" in exchange for his refusing to write out a disciplinary report on her. The request for something "gratifying," like the "be cooperative remark, is admittedly subject to the same criticism that it is ambiguous on its face as to whether it refers to sexual activity. In this court's opinion, however, the remark is

more likely to be interpreted in a sexual way than the "be cooperative" remark. Even putting aside whether the remark itself can be read as sexual in nature, the entire April incident bolsters plaintiff's case. At a minimum, it could be used by plaintiff to provide context for interpreting the later June incident. In fact, plaintiff stated in her deposition that she interpreted Bradley's comments in June to "mean the same thing" as his comments in April. (Dep. at 113.) In addition, the April incident could be used to undercut any argument that the June incident was simply an isolated instance of plaintiff interpreting a stray remark out of context.

In particular, again viewing the evidence from plaintiff's point of view, the two incidents show a very similar modus operandi. In both cases, Bradley approaches plaintiff on a Friday, tells her he is mulling over whether to issue a negative written statement about her job performance, makes an ambiguous request for something, and gives her the weekend to think it over. In both cases, the following week, when plaintiff has not complied with the ambiguous request request, he issues a negative written statement about her job performance, each time telling her to look in her mailbox and each time justifying the statement by relying on documents plaintiff believes were fabricated.

2. Other Contemporaneous Statements and Gestures.

In addition to this evidence, there is other evidence contemporaneous with the "be cooperative" remark. For example, Bradley allegedly told Robinson that she "liked making things hard," while at the same time looking down

at the direction of his crotch. While it is possible that plaintiff mistakenly construed a momentary glance, such a conclusion is not one that can be made on motion for summary judgment. [FN8] This remark and gesture, when coupled together, are evidence that Bradley had a sexual motive in mind.

> FN8. This court is mindful of the inherent danger that a plaintiff may mis-interpret bodily gestures and facial expressions. As the Seventh Circuit recently pointed out, however, the important point is that the ploaintiff's interpretation be based on "objective characteristics of an interaction." *Minor v. Ivy Tech State College,* 174 F.3d 855, 858 (7th Cir. 1999). In *Minor*, the plaintiff thought her supervisor was coming on to her in part because he used what she believed was a "sexy voice" when he called her on the phone. *Id.* at 856. The Seventh expressed concern that a plaintiff "could get to a jury on the basis of nebulous impressions concerning tone of voice, body language, and other nonverbal, nontouching modes of signaling." *Id.* at 858. At the same time, it reaffirmed "the importance of context" that" can ominously magnify the import of the speaker's words." *Id.* This context includes "gesture, inflection, the physical propinquity of speaker and hearer, [and] the presence or absence of other persons." *Id*

***8** There are other contemporaneous statements as well. On the Friday before the weekend, Bradley asked plaintiff- "how badly do you want it and what are you willing to do to get it." [FN9] Later the next week, when Robinson confronted Bradley and accused him of fabricating the Classroom Observation forms, Bradley said that in fact he had "observed: plaintiff and that he "liked what he saw." he made this statement while--in the words of the complaint-- "slowly eye[ing] plaintiff from head to toe." (Cmplt. ¶ 29.)

The latter statements were apparently made at or very near the time of the "be cooperative" remark. Again, as with that remark, all these statements and gestures have potentially innocent, work-related meanings that a jury well may find are not sexual, but their cumulative effect raises more of a question that would one remark standing alone.

> [FN9]. It should be noted that the 300-day limitations cut-off date is on Saturday, June 25, 1994. Therefore, the remarks made on the Friday before the weekend are technically one day outside the limitations period.

3. Reasonable Inferences In Plaintiff's Favor.

Putting all this evidence together, we can now answer the relevant question here. Under the applicable standards for a quid pro quo claim, as discussed in the R & R, plaintiff must show that Bradley made a sexual request or advance and that he made submission to that request or advance a condition of plaintiff's employment or that he used her submission or rejection of that request as a basis for making employment decisions. (*See* R & R at 8, quoting 29 C.F.R. § 1604, 11 (a).) The magistrate judge correctly concluded that the only disputed question was the first half of the equation--whether the request by Bradley was sexual in nature. There is no dispute concerning the second half of the equation (assuming, again, that you believe plaintiff's side of the story.) It seems clear that Bradley was proposing an exchange of some sorts. If plaintiff would be more cooperative, he would give her a better job evaluation. The only dispute is what he meant by "cooperation." Was he referring to her work on the job or was he referring to some sort of sexual favor? [FN10]

FN10. Bradley stated that he changed Robinson's room assignment because the other teacher with which she was sharing the room (Rochelle Harris) made complaints about Robinson, asserting that she was not cooperating in the assigned "team teaching" duties.

In attempting to answer this question, there are several inferences that could be made in plaintiff's favor. The first and probably strongest one is the simple fact that Bradley refused to provide an innocent explanation when given the opportunity to do so. he failed to do so both on the Friday when he first asked plaintiff how badly she wanted the better job rating and then again the next week when he made the "be cooperative" remark. Each time, plaintiff asked what he meant by his remarks, and each time he responded in the same vague manner, stating that plaintiff was a "smart woman" and would know what he meant. Plaintiff stated in her deposition testimony that she thought these remarks were "vague" and "silly" and she did not know what to make of them.

This absence of an explanation raises questions. If Bradley did not intend for the remardk to be taken as a sexual request, then why did he not explain to Robinson what he meant when she asked her? Why leave her guessing? Especially, why do so when he was aware that she had been considering filing a sexual harassment claim since February, that she believed that he had "come on" to several years before while they were on the playground, and that, at a minimum, she was prone to misinterpreting his comments?

*9 Along a similar line, if Bradley was requesting that Robinson be more cooperative with regard to her work duties, then why only give her such a short time period to comply? On the Friday, he only gave her "over the weekend" to comply. Also, it was the end of the school year and the record suggests that there was little time left to make amends for any job deficiencies. The timing and surrounding circumstances do not exactly fit within the typical scenario whereby an employee is given a period of time to improve her job performance.

In addition, it is important to remember that Robinson has alleged that Bradley created false documents, specifically the Observation Forms. She alleges that he never observed her on the dates he claimed to have done so. If you believe her on this point, as we must do here, then a question arises as to why Bradley would engage in such fabrication if he did not have an improper sexual motive and instead only had a job-related motive?

In sum, this court finds that the prior history between Bradley and Robinson, the other contemporaneous statements and gestures, and the reasonable inferences are enough evidence to allow a jury to conclude that Bradley was making a sexual overture when he suggested that plaintiff "be cooperative." Therefore, viewing this evidence in the light most favorable to plaintiff, this court thus denies the summary judgment motion as it pertains to the Title VII claim based on a theory or quid pro quo harassment.

In making this ruling, this court respects the magistrate judge's analysis and his apparent concern that the remark in question is simply too vague on its face to support a quid pro quo claim. It is true that Bradley never made an explicit sexual request and that the words he used can be interpreted in a way consistent with a job-related purpose. However, we must always be wary of the fact that a person engaging in sexual harassment will be keen to do so in a way that is hard to detect. Such person may intentionally use vague and ambiguous language for the very purpose of thwarting a later investigation--choosing words that can be used privately (in conjunction with bodily gestures or facial expressions) to convey an illicit meaning but that can also be interpreted later in a way to suggest an innocent, non-sexual meaning.

III. Appointment Of Counsel.

Having addressed the merits, this court finds that it is appropriate to re-visit the issue of appointment of counsel. Plaintiff previously filed a motion for the appointment of counsel, which this court denied without prejudice. Now, after having found that plaintiff may go foward on her Title VII claim, this court finds that appointment of counsel is warranted.

## CONCLUSION

For the reasons set forth above and in the R& R, this court denies summary judgment with respect to the quid pro quo Title VII claim but grants summary judgment in favor of

the defendants with respect to all other claims. This court also grants plaintiff's motion for the appointment of counsel.

**ENTER:**

s/_____
JOHN A NORDBERG
Senior United States District Court Judge

**DATED:** August 17,1999

## APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Robinson

Case 96 C 92
Joan H. Lefkow
vs. 11/8/2001

Board of Education of the City of Chicago

Docket Entry:
(10) [Other docket entry] Objections to plaintiff's witnesses are ruled on as stated on the reverse side of this minute order.

**ORDER**

**Frances Turner** and **Katherine Jackson** may be called in the rebuttal phase of plaintiff's case if needed to rebut any testimony of defense witnesses concerning the reprimand issue.

**Jacqueline Baker's** testimony is irrelevant. The issue on trial is whether plaintiff was sexually harassed by her principal under federal law. Whether he violated an existent or non-existent Board policy is not relevant.

**Cozetta Trimble** may testify her observations of relevant events.

**Lela M. Coleman** may testify to her observation that plaintiff declined to be alone with Bradley.

**Bobbie McDonald's** testimony is hearsay and inadmissable.

**Loesther Foley** may testify in rebuttal if defendant presents evidence that plaintiff was generally an ineffective teacher of difficult to get along with.

**Xiamora Metcalf's** testimony is irrelevant to plaintiff's case-in-chief. Nevertheless, if defendant offers evidence suggesting that plaintiff did not follow correct procedures in notifying her employer, plaintiff may call her in rebuttal.

**Corrine Leak** may be called only on the same terms as Ms. Metcalf and only if Ms. Metcalf does not testify. Both would be cumulative.

**Gary Mitchell, John Thomas, Maurice Bullet, Deborah Brotzk,** and **Vickie Williams** may be called in rebuttal if defendant offers evidence concerning them tat the witnesses would contradict.

**Belkis Santos** may testify only if plaintiff can demonstrate the relevance of his testimony to a fact in issue.

**Victor Gonzales's** receipt of information about Bradley's harassment is irrelevant.

**Dorothy Newlin's** testimony would only serve to authenticate inadmissible hearsay.

**Pamela Moore**and **Joseph Currie** may testify to their own observations of plaintiff during the time period at issue, and Ms. Moore may testify concerning a message from Cozetta Trimble.

**Charles Bold** and either **Waheed Fahkri** or **John Green** may testify that plaintiff reported Bradley's conduct towards her to them.

Plaintiff may not call **defendant's designated witnesses** in her case in chief unless she sesignated them as her own in the pretrial materials. **Rebuttal witnesses** may be called by leave of court.

__Notices mailed by judge's staff.
number of notices - 2
date mailed notice - 11/8/2001

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISCTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Carol Y. Robinson, Pro Se<br>Plaintiff,<br><br>v.<br><br>Board of Education of the City of Chicago;<br>Blondean Davis;<br>John H. Bradley, Jr.,<br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)RECEIVED<br>)Nov 09 2001<br>)Michael W. Dobbins<br>)Clerk, U.S. District Court | No. 96 C 0092<br>Judge Joan Lefkow<br>Magistrate Judge<br>Ashman<br><br>Jury Trial Demanded |

**PLAINTIFF'S MOTION TO RECUSE/DISQUALIFICATION**

I, Carol Y. Robinson, acting in a Pro se capacity, hereby request this Court to grant Plaintiff's Motion To Recuse/Disqualification under 28 U.S.C. Section 455 (a) and (b)(1). In support of her motion Plaintiff states:

U.S.C. Section 455 (a) and (b)(1) provide:

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice

concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

This case was reassigned to the Honorable Joan Humphrey Lefkow on September 5, 2000 by Executive Committee Order.

Judge Lefkow has made comments to the Plaintiff which indicates she has a "personal bias or prejudice" concerning her and favoring the Defendants. A pretrial conference in this matter was scheduled for July 25, 2001. Plaintiff arrived early for the conference and sat in the courtroom. Attorneys for Defendants arrived shortly thereafter. The parties were directed to relocate to another room. To the best of Plaintiff's recollection, it was a jury room or a witness room located behind the courtroom. Plaintiff had anticipated that the proceeding would take place in the courtroom in the presence of a court reporter in order that a record of proceeding might be made for future use in the event of a dispute between the parties.

During the conference, discussion was had concerning issues in the lawsuit. At one point during the discusssion, Judge Lefkow motioned for the attorneys for Defendants to leave the room. When Judge Lefkow and the Plaintiff were alone, Judge Lefkow inquired of Plaintiff in an unpleasantly terse tone, "Do you think it's fair to *me* for you to go ahead with your lawsuit?" The judge then described her unsolicited views about sexual harassment lawsuits. Her tone of voice was in stark contrast to that which she uses on the record in open court. She stated that these cases are nothing but "he said, she said". She further stated that jurors always "forgive the perpertator". The judge went on to share with the Plaintiff, "I had a case like this before. It [the plaintiff] was a man. He went ahead to trial. *He lost*." Though subtle, it was discernable that the

Judge was attempting to intimidate the Plaintiff. Judge Lefkow made clear her feelings about cases of sex discrimination. She indicated that, for her, they were a waste of time and inferred that anyone going foward with such a case evidenced what she perceived to be a disrespect for her court's time. Earlier in the hearing while counsel for Defendants were present, Judge Lefkow had said Plaintiff's case would put people to sleep. She then tilted her head to the side, closed her eyes, and made a light snoring sound supposedly indicating bored jurors.

Judge Lefkow also questioned Plaintiff as to whether she thought it fair to any potential jurors for Plaintiff to go to trial. She stated disdainfully that Plaintiff's exercising her right to a jury trial would deprive potential jurors of a chance to "earn a day's pay" at their places of employment "just so you can have your day in court".

Plaintiff was quite shocked by the content and tone of Judge Lefkow's remarks. She told Judge Lefkow that she was sorry that she felt the way that she did but that her decision to go to trial had nothing at all to do with an inconsideration for the Court's time. Rather Plaintiff's reason for going to trial was to seek redress from the court for Defendants' unlawful behavior.

While Plaintiff feels the Judge is entitled to her opinion as she is just as human as anyone else, her strong feelings and beliefs regarding the subject matter of this case as well as the animosity she apparently harbors toward the Plaintiff, are such that Plaintiff questions the integrity of the Court and has doubts as to whether she would receive a fair trial before it.

Plaintiff acknowledges that we do live in a litigious

society. Plaintiff, however, has never been a party to a lawsuit. The court's docket may be bursting at the seams and that is unfortunate. A Plaintiff, however, should never be made to feel that his pursuit of justice is a burden upon the court inasmuch as his taxes help to support it. If there is a need to place blame, it should be placed squarely upon the shoulders of those to whom it belong--defendants guilty of unlawful conduct, for without such unlawful behavior, actions such as this one could not be brought. It is not through any fault on the part of the Plaintiff that her case was reassigned to this Court.

The judge noted that the parties had previously participated in a settlement discussion. She asked Plaintiff how much money Defendants had offered her. When the Plaintiff told her the amount, the Judge asked in a condescending tone of voice, "Have you ever had that much money? You could put a down payment on a house." While it is perhaps the duty of judge to "encourage" settlement of disputes in an interest to reduce the court's docket, it should never give the impression that it is a plaintiff's only option for resolution.

During the pretrial conference the parties were treated differently. Counsel for Defendants were listened to courteously with their arguments being heard in its entirety while Plaintiff was cut off time and again prompting Plaintiff to request permission to present written responses to Defendants' motions in limine. Plaintiff was ignored when she complained to the Court that the Defendants wanted to argue a motion in limine which had not been served upon the Plaintiff The Plaintiff was served with four or five motions, not six as the Defendants claim and Plaintiff disputed the method of service. She was again ignored..

This Court committed acts during the pendency of this action before her that are probably unethical. During the pretrial conference, for example the Judge started to hear argument aboutevidence which had been objected to by the parties. When it became apparent that this procedure was going to be time consuming, she asked Defendants' counsel, Sunil Kumar, if she granted his motions in limine whether it would lessen the number of exhibits she would have to rule on. He stated that it would. Judge Lefkow stopped hearing arguments on this topic and rescheduled it for hearing on October 18, 2001.

Plaintiff found this action to be unsettling in that she felt any argument she offered in response to Defendants' motions in limine would be an act of futility in that the Judge had already indicated how she would rule. Her implication was that she would be ruling, not based on the merit of the arguments in support of the motions, but rather she would be ruling in a way that would make life easier for her. Plaintiff does not argue, here, that she will not agree with any ruling the Judge may make in regards to the motions in question. Plaintiff's concern is that the rulings will be made based on factors other than the merit.

More recently, the court has, based on ex parte communications between the Court and Defendants' counsel, Sunil Kumar, allowed Defendants to force Plaintiff into scheduling that is unfavorable to her. Without consulting the Plaintiff to ask whether she would agree to a change in scheduling, the Court granted Mr. Kumar's request to make changes to the Court's schedule not once, but twice which was adverse to the Plaintiff. The details of this event are elaborated upon in Plaintiff's Motion to Correct and Clarify the Official Record filed on November 5, 2001. When the Plaintiff made the same request of the Court, she was told it was not possible without the consent

of counsel for Defendants. Mr. Kumar, in a telephone message he left with the Plaintiff, stated that it was Judge Lefkow's and her clerk Michael Dooley's preference that Plaintiff not file written motion about the changes in scheduling. Mr. Kumar declined to attend the motion to refute Plaintiff's contentions. Judge Lefkow did not deny that she had asked that nothing be filed in writing regarding this matter. Though under no obligation to do so, the Judge could have denied that this was her position. It would have certainly gone a long way in eliminating any appearance of impropriety.

That Plaintiff *did* present a motion was obviously disturbing to the Court. Plaintiff saw no harm in presenting the issue in writing as is may be needed to preserve error. Why the Court would discourage anything in writing confounds the Plaintiff.

It was not the unfavorable ruling to Plaintiff's motion that is at issue here. It is the circumstances surrounding it which would lead a reasonable person to believe the Court was being neither fair nor impartial.

Because the Plaintiff felt the Judge would not be impartial in her rulings, the Plaintiff notified the Court on November 6, 2001 that she would not attend the hearing scheduled for November 7, 2001 because she did not plan to go forward with her case, pending the outcomes of a "Complaint of Judicial Misconduct" (for numerous reasons) she plans to file against Judge Lefkow and that she would also be making a motion for the Judge to disqualify herself from this action. The Judge went ahead with the hearing in the absence of the Plaintiff and, according to a phone call from her clerk, ruled on Defendant's motions in limine.

For the reasons stated above as well as the statements Plaintiff offers in her affidavit, attached to this motion, the Plaintiff prays this Honorable Court to grant Plaintiff's Motion To Recuse/Disqualification.

Respectfully submitted,

s/ _____
Carol Y. Robinson, Pro se
November 9, 2001

5838 S. Michigan Avenue
Chicago, Illinois 60637
(773) 288-3134

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Carol Y. Robinson | ) | |
| Pro Se | ) | No. 96C0092 |
| | ) | Judge Joan Lefkow |
| Plaintiff | ) | Magistrate Judge |
| | ) | Martin Ashman |
| v. | ) | |
| | ) | Jury Trial Demanded |
| Board of Education of the | ) | |
| City of Chicago; Blondean | ) | RECEIVED |
| Davis; John H. Bradley, Jr. | ) | Nov 09 2001 |
| | ) | Michael W. Dobbins |
| Defendants | ) | Clerk U. S. District |
| | ) | Court |

**AFFIDAVIT OF CAROL Y. ROBINSON**

CAROL Y. ROBINSON, ON OATH, states as follows:

1. I am a United States citizen over the age of eighteen years.

2. As the Plaintiff in Case No. 96c0092, Carol Y. Robinson v Boards of Education of the City of Chicago, et. al., I participated in a scheduled pretrial conference on July 25, 2001 before the Honorable Judge Joan Humphrey Lefkow.

3. Also participating in the above stated pretrial conference were Sunil Kumar, Taryn Springs, Sherri Thornton, and David Hemenway.

4. Sherri Thornton was allowed to participate in the pretrial conference of July 25, 2001 before Judge Lefkow even though, according to the Plaintiff's understanding, and the civil docket in this case, Judge Lefkow did not grant Defendant's motion to substitute the appearance of Sherri Thornton for Taryn Springs until August 8, 2001 about a week or so *after* the pretrial conference.

5. Judge Lefkow asked Plaintiff, "Do you think it's fair to *me* for you to go ahead with your lawsuit?'

6. Judge Lefkow stated that jurors always "forgive the perpetrator".

7. Judge Lefkow told her she had presided over another sexual discrimination case and that the Plaintiff in the case had lost the case.

8. Judge Lefkow questioned Plaintiff as to whether she was being fair to any potential jurors who would serve at trial and stated Plaintiff would be deprive them of a chance to "earn a day's pay" at their places of employment "just so you can have your day in court".

9. The Judge asked Plaintiff in a condescending tone whether she had ever had the amount of money Defendant had offered to settle this lawsuit and suggested she could use the money to put a payment down on a house

10. Judge Lefkow has demonstrated that she is not

impartial in this action in that she has consistently treated Defendants more favorabley than Plaintiff. For example, changing the original date of a hearing in which important decisions were to be made upon Defendant's request withou consulting the Plaintiff, while denying same opportunity to Plaintiff. She additionally denied Plaintiff an opportunity to confirm Defendant's excuse that they asked the Court to reschedule a hearing with Plaintiff because counsel for Defendant was allegedly under an Order from Judge Darrah not to leave his courtroom to attend the hearing scheduled with Plaintiff. Due to this one sided communication between the Court and counsel for Defendant, Sunil Kumar, Plaintiff has no way of knowing or verifying *what* was said in order to get the court to change the original hearing date of October 18, 2001

11. Judge Lefkow ignored Plaintiff's complaint that she had not been served with all Defendants' motions in limine and the manner in which they were served.

12. Judge Lefkow inquired of counsel for Defendants, Sunil Kumar, as to whether her granting of his motions in limine would result in fewer proposed trial exhibits she would have to rule on. Mr. Kumar stated that it would result in fewer exhibits on which the Judge would rule.

13. Sunil Kumar, counsel for Defendants stated to Plaintiff in a telephone message that Judge Lefkow and her clerk, Michael Dooley, preferred that there be nothing in writing about the change in the date of the hearing from October 18, 2001, to October 24, 2001, and subsequently to November 7, 2001.

14. A copy of the telephone message referred to above is available and was offered to the Court.

15. On November 5, 2001, Plaintiff's Motion to Correct and Clarify the Official Record was heard by Judge Lefkow. On this date Plaintiff asked if the scheduled hearing of November 7, 2001 could be changed. The Court indicated that it could not be done without permission from the Defendants.

16. On November6, 2001, Plaintiff submitted a "Notice to the Court" statement to Judge Lefkow's clerk Michael Dooley stating that Plaintiff would not attend the scheduled conference of November 7, 2001 as she did not plan to go foward with the case until after filing a "Complaint of Judicial Misconduct" in regards to Judge Lefkow and additionally a motion of disqualification of Judge Lefkow.

17. On November 7, 2001, the Plaintiff learned in a message from Judge Lefkow's clerk that she had ruled on the hearings in the Plaintiff's absence.

18. I am competent to testify and would testify to the foregoing, if called upon to do so.

Upon information and belief, I, Carol Y. Robinson, state that I believe the statement above to be truthful and accurate.

**FURTHER AFFIANT SAYETH NOT**

s/_____
Carol Y. Robinson

"Official Seal"
Robert Maslowsky
Notary Public, State of Illinois
My Commission Exp. 07/25/2004

Subscribed and sworn to before me
this 9 Day of Nov. 2001
at Chicago, County of Cook, State of Illinois

s/_____
Notary Public

## APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Robinson

Case 96 C 92
Joan H. Lefkow
11/7/2001

vs.

Board of Education of the City of Chicago

Docket Entry:
(10) [Other docket entry] Final pretrial conference held. Defendant appears by counsel, Sunil Kumar. Plaintiff does not appear. Hearing held on defendant's conduct with respect to continuation of final pretrial conference from October 24 to November 7. Motions in limine will be ruled on, based on the parties' written submissions, by November 7 at 5:00 and the ruling will be posted on the court's website. All objections to exhibits are reserved to trial. The court acknowledges plaintiff's "Notice to the Court" filed November 6, 2001, in which plaintiff advises that she will not attend the pretrial conference of November 7 and will not attend the trial on November 13. Plaintiff has not been excused from attendance at either proceeding. Plaintiff is advised that the case will be called for trial on Tuesday, November 13, 2001, at or about 10:00 a.m. If plaintiff does not appear, the court will be obliged, regretfully, to dismiss the case with prejudice.

__ Notices mailed by judge's staff.
number of notices - 2
date mailed notice - 11/8/2001

## APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| CAROL ROBINSON, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Case No. 96 C 0092 |
| vs. | ) | Judge Joan H. Lefkow |
| | ) | |
| BOARD OF EDUCATION, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**Ruling on Defendant's Motions in Limine**

The court, having considered the defendant's motions in limine and the responses thereto filed by plaintiff, enters the following rulings:

**First Motion** to bar evidence of any claims other than quid pro quo sex discrimination that occurred between June 25, 1994 and September 1, 1994.

Defendant relies on the court's grant of summary judgment in which it "den[ied] summary judgment in respect to the quid pro quo Title VII claim but granted summary judgment in favor of the defendants with respect to all other claims." Robinson v. Board of Education of Chicago, No. 96 C 92, 1999 WL675302, *9(N.D.Ill.) Thus it is clear that any evidence in support of a claim under 42 U.S.C. § 1983 is barred at trial. The same is true for a claim of retaliation if plaintiff seeks to demonstrate that she

was disciplined for asserting her Title VII rights. Nevertheless, plaintiff alleges various adverse actions against her and that she ultimately was transferred to another school after she refused sexual advances made by the Board's agent, Bradley. In this sense, she claims to have been retaliated against and can offer evidence of it. As to the time frame, the period for which recovery is available is only for the period between June 25, 1994 and September 1, 1994. Plaintiff will, however, be permitted to offer evidence of events occurring before that time in order to demonstrate Bradley's motive or intent when he made statements or did acts. See 1999 WL675302 at *2(Although it is true that plaintiff may not recover for acts committed before the cut-off, it does not follow that evidence of such acts may not be introduced in a trial concerning those acts that are timely.") The motion is granted with respect to the time limitation as stated above.

**Second Motion** to strike claims for punitive damages against Bradley and Davis and for future lost earnings.

Defendant argues that because the 1981 claim has been dismissed, neither Bradley nor Davis is a proper defendant and therefore cannot be subject to punitive damages. Section 2000e(b) defines "employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person..." Nevertheless, under *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995), a supervisor does not, in his individual capacity, fall within Title VII's definition of employer. Therefore, damages are not recoverable against these defendants. Because liability in their capacity as agents would be the same as the liability of the employer, the motion is granted, and

defendants Blondean and Bradley are dismissed as defendants.

**Third Motion** to bar evidence of unsubstantiated rumors or alleged sex harassment or affairs.

Defendant objects on grounds of relevance, hearsay, and unfair prejudice. Plaintiff states that she intends to offer evidence or rumors about Bradley's "bad acts" to prove why she was afraid to go alone into Bradley's office. Plaintiff herself may testify that she had heard rumors about Bradley's sexually assertive behavior towards other women at the school, and that was the reason she did not want to meet alone with Bradley. She may not, however, state specifically what she had heard or interrogate any other witness about what they had heard or said about Bradley's "bad acts." The court will instruct the jury not to consider plaintiff's statement as evidence that he engaged conduct alluded to in rumors. The motion is granted in part and denied in part.

**Fourth Motion** to bar evidence of District Superintendent Blondean Davis's knowledge of the law of negligence, alleged disciplinary suspension of Davis, and negligent acts by Davis that post date the alleged tangible employment action.

Assuming that Dr. Davis was in the chain of command regarding sexual harassment, and assuming that plaintiff lodged a complaint, directly or within that chain of command, evidence of what Davis did with respect to that complaint is relevant to this case. Evidence that Davis was disciplined with respect to handling funds is unrelated to this case and not relevant. If plaintiff offers evidence of a statement Davis made to the EEOC, it may be an admission. Otherwise, if Davis testifies inconsistently with the statement made to the EEOC, plaintiff may use the statement to impeach her. Whether Davis had a motive to

lie is an inference that the jury may draw from the facts such as Davis's position, her demeanor, and her credibility in general. She may not be interrogated about her knowledge of the law of negligence. She may be interrogated about her knowledge of her responsibilities with respect to a complaint of sexual harassment. The motion is granted, except as stated herein.

**Fifth Motion** to bar evidence of grievances file against the defendant, Bradley or of "bad acts" of Bradley that post-date the filing of plaintiff's complaint

Evidence that Bradley allowed prayer meetings at Scanlan school, that Bradley's child enrolled there, and that Bradley allegedly mishandled funds, and that grievances were filed against the Board of Bradley not directly related to any of these matters, is irrelevant. If Mary Harrington is called as a witness, she may be cross examined as to her "friendly" relationship with Bradley in order to show bias of the witness. Plaintiff may also call other witnesses who observed the friendly relationship at the time of the events at issue here. The motion is granted in part and denied in part as stated herein.

**Sixth Motion** to exclude the testimony of, and other evidence regard Pamela Moore, Joseph Currie, and John Green

Defendant contends that plaintiff did not disclose these witnesses in her responses to written discovery which plaintiff concedes. She argues, however, that the names were made known through the depositions of witnesses. Defendant cites Santiago v. *Furniture Chauffers, Piano Movers, Packers, and Handlers Local 705*, 2001 WL 11058 *7-8 (N.D.Ill), in which Judge Kennelly excluded testimony of witnesses who had not been disclosed in responses to interrogatories. The court there stated, however,

> Plaintiff's assert that "[a]ll" of the witneeses disclosed in the draft pre-trial order are persons who have been disclosed throughout written *and* oral discovery and whom the defendants have had an equal opportunity to interview and depose,"...but they provide the Court with nothing to back up their assertion. This unsupported claim is insufficient to rebut defendants' argument.

Thus, the case does not stand for the proposition that disclosure of witnesses through oral discovery is insufficient, and this court does not so conclude here. Nevertheless, the testimony of Joseph Currie, Pamela Moore and John Green must be (a) limited to the matters contained in the deposition testimony and (b) probative of a fact in issue. The motion is denied as stated herein.

ENTER:

s/_____
JOAN HUMPHREY LEFKOW
United States District Judge

Dated:Nov. 7, 2001

## APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
[Filed November 6, 2001]

| | | |
|---|---|---|
| Carol Y. Robinson, Pro Se Plaintiff, | ) | No. 96 C 0092 |
| | ) | Judge Joan Lefkow |
| | ) | Magistrate Judge Ashman |
| v. | ) | |
| | ) | |
| | ) | Jury Trial Demanded |
| Board of Education of the City of Chicago; Blondean Davis; John H. Bradley, Jr. Defendants | ) | Received Nov 06 2001 |
| | ) | Judge Joan H. Lefkow |
| | ) | United States District Court |

**To:** Honorable Judge Joan Humphrey Lefkow
The United States District Court for the Northern District of Illinois, Eastern Division
219 South Dearborn Street Courtroom 1925
Chicago, Illinois 60603

**From:** Carol Y. Robinson, Plaintiff Pro se
5838 S. Michigan Avenue
Chicago, Illinois 60637

### NOTICE TO THE COURT

I, Carol Y. Robinson, Plaintiff in the above captioned action, wish to notify this court that she will not be in attendance in court on November 7, 2001 for a scheduled hearing in this case. Additionally, Plaintiff will not be in attendance in court on November 13, 2001, the

date scheduled for trial of this matter. The Plaintiff does plan to go forward with her case, pending the outcomes of the actions discussed below.

Because Plaintiff feels it necessary in order to receive a fair trial, she will be file a "Complaint of Judicial Misconduct" regarding this Court. Plaintiff is in the process of requesting transcripts of hearings in the case and will complete and file the "Complaint of Judicial Misconduct" as soon as it is possible for her to do so.

The Plaintiff is of the opinion that it would not be prudent not to go foward at this time due to the fact critical decisions in this case would be made by a judge the Plaintiff feels should be disqualified from sitting on this case due to her conduct, in certain instances, while this case has been pending before her. So, to that end, Plaintiff will also file a "motion for disqualification" of Judge Joan Humphrey Lefkow.

This statement is a written follow-up to the telephone call of Monday, November 5, 2001 to the Court's secretary, and to the call of Tuesday, November 6, 2001 to the Court's clerk, Michael Dooley, in which Plaintiff expressed her intent not to go foward with this action at this time.

Respectfully submitted,

s/_____
Carol Y. Robinson
Plaintiff, Pro se
November 6, 2001

## APPENDIX K

01-0822-AR12 August 22, 2001

Resolution Re: Personal Services Agreement
With Blondean Y. Davis

WHEREAS, Blondean Y. Davis ("Davis") has been employed by the Board of Education ("Board") since September 7, 1970, most recently as the Chief of Schools and Regions;

WHEREAS, Davis has indicated her desire to resign from her employment with the Board in order to pursue other opportunities.

NOW, THEREFORE, BE IT RESOLVED, as follows:

1. The Board acknowledges and accepts Davis' resignation from her employment with the Board effective July 31, 2001.

2. From August 1, 2001 through April 30, 2002, Davis shall be available to serve as a consultant to the Board and shall render general consulting services as reasonably requested by the Board and shall be compensated on a monthly basis in that amount which is equal to her current monthly salary, including Board offered benefits.

3. Davis shall receive a lump sum payment for all accrued and unused sick and vacation days as of July 31, 2001.

Supreme Court, U.S.
FILED

02 788 SEP 12 2002

OFFICE OF THE CLERK

No. _____

# In the
# Supreme Court of the United States

CAROL Y. ROBINSON

*Petitioner,*

*v.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO
BLONDEAN Y. DAVIS
JOHN H. BRADLEY, JR.

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## SUPPLEMENTAL APPENDIX

CAROL Y. ROBINSON
*Pro se*

5838 SOUTH MICHIGAN AVENUE
CHICAGO, IL 60637-1116
(773) 288-3134

21 pgs

## PARTIES TO THE PROCEEDING

### Petitioner

Petitioner is Carol Y. Robinson, an individual citizen of the United States, residing in the Northern District of Illinois. Petitioner has no corporate affiliations. Carol Y. Robinson was the Plaintiff in the District Court, and the Appellant in the Seventh Circuit Court of Appeals.

### Respondents

The Board of Education of the City of Chicago - Pursuant to amendments to the Illinois School Code, the Illinois Legislature established the Chicago School Reform Board of Trustees, in an amendatory act which took effect in 1995, to take the place of the former Board of Education thereby turning over the control of the Chicago Public Schools to Mayor Richard M. Daley of Chicago. See, 105 ILCS 5/34-1, et seq. Each city having a population exceeding 500,000 shall constitute one school district which shall maintain a system of free schools under the charge of a board of education. The district shall be a body politic and corporate by the name of "Board of Education of the City of ....." and by that name may sue and be sued in all courts and places where judicial proceedings are had. 105 ILSC 5/34-2.

Blondean Y. Davis is an individual, formerly employed by the Board as Chief of Schools and Regions.

Davis resigned from the Board effective July 31, 2001. She is currently Superintendent of Matteson Elementary School District 162.

John H. Bradley, Jr. in an individual. Bradley is/was a principal at the Songhai Learning Center Petitioner is unaware of Bradley's current employment status with the Board.

Respondents Board, Davis, and Bradley were the Defendants in the District Court and the Appellees in the Seventh Circuit Court of Appeals.

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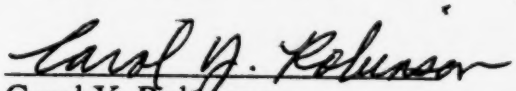
Report and Recommendation.....1

## STATEMENT OF COMPLIANCE

This supplemental appendix, consisting of the report and recommendation of the magistrate, United States District Court for the Northern District of Illinois, is hereby submitted in order to comply with the content requirements of Rule 14 as it pertains to petitioner's writ of certiorari.

The supplemental appendix complies in all respects with rule 33.1.

Respectfully submitted,



Carol Y. Robinson
Petitioner, Pro se
November 17, 2002

5838 S. Michigan Avenue
Chicago, Illinois 60637-1116
(773) 288-3134

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **CAROL Y. ROBINSON,** | ) | |
| | ) | |
| Plaintiff, | ) | Case No. 96 C 92 |
| | ) | |
| v. | ) | Judge John A. Nordberg |
| | ) | |
| **BOARD OF EDUCATION OF THE CITY OF CHICAGO,** et al., | ) | Magistrate Judge Martin C. Ashman |
| | ) | |
| | ) | |
| Defendants. | ) | |

## REPORT AND RECOMMENDATION

Pro se Plaintiff, Carol Robinson, sued Defendants, Chicago School Reform Board of Trustees (the "Board"), **[FN1]** Dr. Blondean Davis, and John H. Bradley, Jr. ("Bradley"), for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and on various state-law grounds. **[FN2]** Defendants move for summary judgment as to all of Plaintiff's claims. For the reasons below, this Court recommends that Defendants' motion be granted in its entirety.

**[FN1]** "Board of Education of the City of Chicago" is not an entity that may be sued. The proper entity is the Chicago School Reform Board of Trustees. *See* 105 ILCS 5/34-1, et seq.

[FN2] Dr. Davis and Mr. Bradley have been dismissed from Plaintiff's Title VII claim. Defendants urge that Dr. Davis be dismissed from the state law claims because Plaintiff's Second Amended Complaint contains no allegations directed against Dr. Davis. Admittedly, Plaintiff does not identify precisely which state law claims are directed against which Defendants, but she does allege that Dr. Davis lied to the EEOC, falsified documents, and as a result, caused Plaintiff emotional distress. (Plaintiff's Second Amended Complaint, ¶ 42). Those allegations are sufficient to keep Dr. Davis from being dismissed, at least for now.

## I. Background

The Board hired Plaintiff as a full-time substitute ("FTB") teacher and assigned her to the Park Manor School. Later, the Board transferred her to Scanlan School ("Scanlan"), where she also served as an FTB teacher until September 1, 1994. On that day, the Assistant Superintendent of Schools informed Plaintiff that she was being released as a FTB teacher, and tentatively reassigned her (subject to her acceptance) to a Substitute Cadre effective September 7, 1994. Plaintiff accepted the reassignment and served as a cadre substitute teacher until February 6, 1995, when whe became appointed full-time teacher at Parker Community Academy of the Chicago Public Schools. Three years later, she became tenured as an appointed full-time teacher, subject to removal only for cause. She has held that position ever since.

Plaintiff alleges in her Second Amended Complaint

that a pattern of alleged sexual harassment began in October of 1993, when Principal Bradley changed her room assignment. Between October of 1993 and June 25, 1994, several alleged acts of harassment occurred. However, for reasons explained below, those allegations are not considered because they are untimely. Thus, the first act of alleged harassment which this Court considers occurred on June 27, 1994, when Plaintiff requested from Bradley a performance rating. She alleges that after Bradley received her request, he told her, "You like making things hard don't you?," while looking in the direction of his crotch.

On or around that same time, Bradley allegedly told Plaintiff that she could have her performance rating improved if she were "cooperative" with him. Plaintiff asked Bradley what he meant, and he allegedly told her that she was a smart woman and that she knew what he meant. Sometime later, Bradley allegedly eyed Plaintiff from head to toe and stated, "I liked what I saw."

Plaintiff never complained nor raised any concerns to the Union delegate of Scanlan regarding her alledged treatment as a teacher. She never complained to any union delegate about her being displaced from Scanlan. She never formally filed a grievance against the Board through the Chicago Teachers' Union regarding her alleged treatment at Scanlan. However, on April 21, 1995, Plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC").

## II Summary Judgment Standard

Summary judgment is proper only when "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56 (c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In ascertaining whether summary judgment is appropriate, the Court must view the evidence, and draw all reasonalble inferences therefrom, in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992). If the non-movant bears the burdent of proof on an issue, however, he or she may not simply rest on the pleadings, but rather, must affirmatively set forth specific facts establishing the existence of a genuine issue of material fact. See *Celotex*, 477 U.S. at 322-26.

Summary judgment is appropriate where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burdent of proof at trial." *Id.* at 322. Consequently, motions for summary judgment myst be analyzed in light of both the applicable substantive law and the question of whether a reasonable jury could return a verdict in the non-movant's favor. See *Checkers, Simon & Rosner v. Lurie Corp.*, 864 F.2d 1338, 1334 (7th Cir. 1988). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-movant party, there is no genuine issue for trial," and summary judgment must be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

## III. Analysis

Defendants argue that certain of Plaintiff's allegations of sexual harassment are untimely. In Illinois, and individual must file a complaint with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the onset of the alleged discriminatory conduct. See 42 U.S.C. § 2000e-5; *Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705, 707 (7th Cir. 1995). Failure to do so renders the complaint untimely. See *id.* The filing period is strictly applied. See *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). Normally, then,

> the plaintiff cannot base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.

*Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996).

Here, the allegations that occurred outside the statute of limitations are barred as untimely. Plaintifff alleges a pattern of sexual harassment that began in October 1993 and continued through August 1994. Because she filed her complaint with the EEOC on April 21, 1995, any acts that occurred prior to June 25, 1994 (300 days from April 21, 1995) cannot form the basis of her sexual harassment claim unless they are saved by the continuing-violation doctrine, see *Galloway*, supra.

While conceding as she must that not every alleged act occurred within the 300-day period, Plaintiff argues that at least two acts are closely related enough in time as to constitute a continuing violation. This argument succeeds only if it would have been unreasonalble to expect Plaintiff to sue before the statute ran.

Plaintiff admits in her complaint that she thought Bradley's behavior constituted actionalble harassment long before June 25, 1994, In paragraph 23 of her Second Amended Complaint, Plaintiff says that she informed Bradley on April 21, 1994 that she was going to report his "sexually harassing behaviors to the school's Local School Council." Also in paragraph 14, Plaintiff says that around February 22, 1994, she warned Bradley that "she was prepared to take legal action against him if he persisted in such behaviors." She also took "off a day or two to explore the legal ramifications of sexual harassment." So over a year before she filed charges with the EEOC, Plaintiff thought her sexual harassment claim to be sufficiently palpable as to threaten lawsuit. In light of these concessions, Plaintiff cannot now rely on the continuing-violation doctrine, and therefore, pursuant to *Galloway*, the sexual harassment claims based on acts that occurred before June 25, 1994 are dismissed.

Turning to the merits of Plaintiff's claim, it is unclear whether Plaintiff is relying on hostile-work-environment sexual harassment or economic quid-pro-quo sexual harassment or both as her theory for recovery. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986). Out of an abundance of caution, and in consideration of Plaintiff's pro se status, this Court will assess the merits of her harassment claim under both theories. In any event, neither is availing.

After eliminating from consideration all the acts that occurred prior to June 25, 1994, the following acts remain:

> (1) Bradley once told Plaintiff, "You like making things hard, don't you, " while looking in the direction of his crotch.
>
> (2) Bradley eyed Plaintiff from head to toe and said, "I liked what I saw."
>
> (3) Bradley suggested that Plaintiff could have her job rating restored if she was "cooperative" with him.
>
> After Plaintiff asked him what he meant by that, he stated that she was a smart womant and that she knew what he meant.

For Plaintiff to prevail, these three alleged acts must constitute either hostile-work harassment or quid pro quo harassment.

For hostile-work harassment to be actionable, it must be sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working environment. *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir.) (citing *Meritor*, 477 U.S. at 67). In analyzing a claim for hostile-work harassment, two questions must be answered. The first is whether the plaintiff was, because of her sex, subjected to such hostile, intimidating, or degrading behavior, verbal or nonverbal, as to adversely affect the conditions under which she worrked. *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir. 1994).

The second question is , if the Court finds a hostile environment in violation of Title VII, then was the defendant's response (or lack thereof) negligent. *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 535-36 (7th Cir. 1993).

The case of *Baskerville v. Culligan Int'l Co.* presents a significant hurdle to Plaintiff's claim here. There, the court, after analyzing nine separate incidents spread over seven months, concluded that they did not add up to sexual harassment. 50 F.3d 428, 431 (7th Cir. 1995). Most of those incidents, which will not be repeated here, see *id.* at 430, were tinged with more sexual innuendo than those of which Plaintiff presently complains. No reasonable trier of fact could find in Plaintiff's favor, and summary judgment should be granted in the Board's favor on the issue of sexual harassment based on a hostile-work environment.

> The EEOC has defined quid-pro-quo harassment as follows:
>
> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

*Id.* (quoting 29 C.F.R. § 1604.11 (a)). The court in *Bryson v. Chicago State Univ.*, 96 F.3d 912, 915 (7th Cir. 1996), observed that a five-part test used by many Courts of

Appeals was a useful framework to determine whether a plaintiff has proved a claim of quid-pro-quo harassment. Under this test, a plaintiff must show (1) that she or he is a member of a protected group, (2) the sexual advances were unwelcome, (3) the harassment was sexually motivated, (4) the employee's reaction to the supervisor's advances affected a tangible aspect of her employment, and (5) respondeat superior has been established. See *id.* (interpreting the fourth factor broadly).

Once again, after eliminating the pre-June 25, 1994 allegations, the only allegation that is important here appears on paragraph 31 of Plaintiff's complaint:**[FN3]**

> On or around June 27, 1994, Bradley told Plaintiff that he was going to get rid of her, (remove her from her job) as soon as he could find a way to do so. He told her that it wasn't too late to save her job and get her former rating restored if she wanted to be "cooperative" with him. When Plaintiff asked what he meant he again told her that she was a smart woman and that she knew what he meant.

This allegation hardly satisfies even the most strained interpretation of the EEOC guideline, *supra*. There is nothing about a bare statement that one be "cooperative" that immediately suggests a sexual overture. Certainly body lalnguage, tone of voice, and so forth may transform an otherwise innocuous word or statement into sexual innuendo, but there is no evidence that Bradley did anything other thatn say that Plaintiff be "cooperative" with him. As such, no reasonable jury could find in Plaintiff's favor on any quid pro quo theory of harassment, and summary judgment should be granted in the Board's favor.

[FN3] If there are other allegations that support a quid-pro-quo quo claim, Plaintiff has not brought them to the Court's attention. This Court will not scour through the numerous exhibits and deposition transcripts filed by Plaintiff in search of evidence that may arguably support such a claim. See *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, (7th Cir. 1995).

Defendants also argue that any claim Plaintiff may have under Section 1983 is barred by the applicable two-year statute of limitations. When Plaintiff filed her original complaint, it was unclear to this Court whether Plaintiff was stating a civil rights claim under Section 1983. So in a March 27, 1998 order, Judge Nordberg informed Plaintiff that she may seek to amend her complaint to add such a claim. Plaintiff did amend her complaint, but did not add any civil rights claims. [FN4]. Accordingly, there are none to consider or discuss.

[FN4] Defendants, for completeness purposes, present argument as to the merits of any Section 1983 claims Plaintiff may be asserting. Plaintiff's complaint clearly makes no mention of Section 1983, and this Court understands from a statement in Plaintiff's brief that "she intends to file" a Section 1983 claim that Plaintiff is not now asserting any Section 1983 claims. Thus, this Court will eschew any unnecessary discussion of Defendants' arguments directed towards Plaintiff's nonexistent Section 1983 claims.

Next, Defendants contend that all of Plaintiff's state law claims are untimely, relying on the Illinois Govermental Tort Immunity Act, 745 ILCS 10/8-101

(1993), which bars civil actions commenced more than one year from the date the injury was received or the cause of action accrued. In Illinois, a cause of action does not accrue until the plaintiff knows, or reasonalbly should know, of his injury. *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E. 2s 1132, 1134-36 (Ill. 1995); *Schweihs v. Burdick*, 96 F.3d 917m 920 (7th Cir. 1996). Plaintiff responds that a defense based on a statute of limitations is an affirmative defense which Defendants must raise in their answer. See FED. R. CIV. P. 8(c).

Under FED. R. CIV. P. 8(c), a defendant is required to set forth affirmative defenses, including the statute of limitations, in his initial pleading. A number of courts, however, have liberalized this pleading requirement by holding that, absent prejudice to the plaintiff, a defendant's failure to raise a statute of limitations defense in the initial pleading does not preclude him from later bringing a motion based on that defense. See *Devalk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326,334 (7th Cir. 1987) (techinical failure to plead affirmative defense is not fatal); *Lacy v. Ameritech Mobile Communications, Inc.*, 965 F. Supp. 1056, 1065 (N.D. Ill. 1997), *aff'd*, 142 F.3d 440 (7th Cir. 1998); *Stewart v. City of Chicago*, 1994 WL 46672, at *1 (N.D. Ill. Feb. 14, 1994); see generally 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1287, at 47-505 (1990). Thus, if the defendant asserts a limitations defense before trial, it is not waived.

Here, Defendants did not assert the statute of limitations as an affirmative defense in their Answer. They have, however, raised that defense in their motion for summary judgment. Plaintiff has not claimed that she was prejudiced by Defendants' failure to raise that defense

earlier. Indeed, any prejudice to Plaintiff would be very slight. Because all of Plaintiff's state law claims arises from her Title VII claim, no additonal discovery is needed. Furthermore, Defendants Davis and Bradley filed their Answers to Plaintiff's Second Amended Complaint on May 1, 1998. They filed their motion for summary judgment only a few months later, on July 31, 1998. Another type of prejudice Plaintiff would suffer (though she does not identify it) is a denial of a decision of her state-law claims on the merits. This is not the type of prejudice prohibiting an exception to the waiver rule. See *Lewis v. Hermann*, 775 F. Supp. 1137, 1143 (N.D. Ill. 1991); see also *Blatnicky v. Village of Shorewood*, 1996 WL 180070, at *5 (N.D. Ill. Apr. 15, 1996); *Czajkowski v. City of Chicago*, 1993 WL 350204, at *2 (N.D. Ill. Sept. 10, 1993). Accordingly, Plaintiff has not suffered any prejudice or unfair surprise as a result of Defendant's raising the limitation defense at this stage of the case.

Turning to the merits of the limitations defense, Plaintiff concedes that the statute of limitations applies by not presenting any argument that it does not. See , e.g. *United States v. Price*, 54 F.3d 342, 346 n.1 (7th Cir. 1995) (arguments not presented in briefs before magistrate are waived); *Citizens Ins. Co. of Am. v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994) ("Arguments not raised in the district court are waived on appeal."). Therefore, all of her state law claims are barred by 745 ILCS 10/8-101.**[FN5]**

> **[FN5]** This Court is aware of the distinction between the onset of the alleged injury and the accrual of a cause of action. Clearly all of Plaintiff's alleged injuries occurred more than one year before she filed her complaint. While the date of the accrual of her state-law causes of

actions is not clear, Plaintiff has not presented any argument on the merits of Defendants' limitations defense, and has therefore waived her ability to raise them later. See *Price*, supra; see also *Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985, 991 (1st, Cir. 1988) ; *Divane v. Krull Elec. Co.*, 1997 WL 337447 (N.D. Ill. June 17, 1997).

Not only are those claims barred, they are also preempted by various Illinois statutes. Again, Plaintiff does not respond to the merits of Defendants' preemption argument, but instead contends that preemption is an affirmative defense under Rule 8(c), and therefore Defendants have waived that defense by not raising it in their Answer. This exact argument was rejected by Judge Kocoras in *Duncan v. Consolidated Freightways Corp. of Del.*, 1995 WL 530652, at *4-*5 (N.D. Ill. Sept. 7, 1995). This Court finds that Defendants have not waived the preemption defense for the reasons stated above in connection with the limitations defense and for the other persuasive reasons set forth in *Duncan*.

There is significant merit to Defendants' preemption argument. Defendants argue that because all of Plaintiff's tort claims are premised upon her Title VII claim, those claims are preempted by the Illinois Human Rights Act ("IHRA"), 775 ILCS 5/1-101 et seq.**[FN 6]**. Plaintiff makes no response and for that reason alone concedes this point.

**[FN 6]** Defendants also argue that the intentional infliction of emotional distress ("IIED") claim is preempted by the Illinois Workers' Compensation Act (IWCA"), 820 ILCS 305/1, et seq. There are

ways to avoid preemption under the IWCA, see *Hunt-Galloway v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F. 3d 1004, 1016 (7th Cir. 1997), but Plaintiff has not made any argument in that regard. Therefore, the IIED claim is preempted by the IWCA. See *id.*

Common-law tort claims that depend on an allegation of sexual harassment may be brought only ounder the IHRA. See *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 493 (7th Cir. 1997), aff'd in part, *Burlington v. Ellerth*, 118 S. Ct. 2257 (1998) (citing *Geise v. Phoenix Co. of Chicago, Inc.*, 639 N.E. 2d 1273, 1276-78 (Ill. 1994). Plaintiff alleges in her Second Amended Complaint, "Other complaints arising from the above stated action [i.e., her Title VII claim] include: Intentional Infliction of Emotional Distress; Gross Negligence; Willful and Wanton Misconduct; Retaliatory Discharge; and Conspiracy to Conceal Facts." (Plaintiff's Second Amended Complaint, ¶ 1.) Because these claims [FN7] are supported by the identical factual allegations of her Title VII calim, they are preempted by the IHRA.

[FN7] The claim of "Conspiracy to Conceal Facts" does not appear to be an actionable tort in Illinois. The Court is not familiar with that cause of action. Notably, Plaintiff concedes that "her complaint in regards to his claim may not be sufficiently clear and may very well be improper for the Plaintiff to pursue in conjunction with the 1983 claim she intends to file upon a motion to do so. Plaintiff cannot sufficiently argue this issue at this time." (Plaintiff's Memorandum in Support of Opposition to Defendant's Motion for Summary Judgment, at 8.) That concession bars her "Conspiracy to

Conceal Facts" claim, which should be dismissed.

Defendants also attack the merits of Plaintiff's IIED claim. This Court agrees that, even if such claim were not barred or waived, Plaintiff cannot establish a claim for IIED. Plaintiff mus show, *inter alia*, that Defendants' conduct was extreme and outrageous. See *Oates v. Discovery Zone*, 116 F.3d 1161, 1174 (7th Cir. 1997). It is clear from the evidence of record that there is no genuine issue of material fact that Defendants' conduct, although boorish, was not so extreme or outrageous as to be intolerable in a civilized community. Plaintiff must also show as part of her IIED claim that she suffered severe emotional distress. See *id*. Her complaints of feeling "anxious," "upset," and "fearful," (Plaintiff's 12(N) Statement, ¶ 36), hardly rise to the requisite level of severe distress. Therefore, Defendants motion for summary judgment should be granted on the merits as to Plaintiff's IIED claim for the independent reason that Plaintiff cannot prove all of the elements of that claim.**[FN8]**

> **[FN8]** Defendants also attack the merits of Plaintiff's retaliatory discharge claim. While the issue of whether she suffered an adverse employment action is not quite as clear-cut as Defendants maintain, that does not preclude a grant of summary judgment. The claim fails procedurally, see *supra*, so it is unnecessary to go into the substantive merits. Contrastingly, the IIED claim clearly has no merit and may be dismissed on both procedural and substantive grounds.

Plaintiff's case suffers from three major shortcomings: she has not brought forth sufficient

evidence to raise issues of material fact; she has sat too long on her procedural rights; and she has conceded many of Defendants' arguments by failing to respond meaningfully to them. **[FN9]**. These shortcomings, unfortunately, sound the death knell of this action.

> **[FN9]** There may be no meaningful responses available to her.

Plaintiff will no doubt be disappointed with this recommendation. However, in the end, this Court must restrict itself to the arguments presented and the evidence properly established in the record to determine the procedural rights of the parties and the substantive merits of the case, no matter how sympathetic a particular case may appear to be. Therefore, this Court recommends that Defendants' motion for summary judgment be granted.

s/_____

**MARTIN C. ASHMAN**
United States Magistrate Judge

**Dated:** February 3, 1999.